CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, JANUARY TERM, 1823.

East'n District
Jan. 1823.

EVANS & AL.
vs.
GRAY & AL.

EVANS & AL. vs. GRAY & AL. ante, 475.

Application for a rehearing.

Livermore, on an application for a rehearing. This action is brought to recover the balance due on a promissory note, made at Lexington, in the state of Kentucky, and which became due on the 12th day of July, 1820. On this note several payments have been made; the last, on the 5th day of January, 1821. The defendants allege, that this note was given in payment for a steam-engine—that the said engine was not made according to contract—that they have incurred great expense in their attempts to make it answer the purpose for which it was intended, and have finally laid it aside as useless. There is no allegation of

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fraud, nor do they pretend to have returned the engine to the plaintiffs, nor to have offered to return it.

To this defence, the plaintiffs object, that, according to the common law, the purchaser cannot refuse to pay the price of an article, while the contract continues open and not rescinded—that he must return, within a reasonable time, the thing sold; and that he cannot keep both the thing and the price. The plaintiffs also contend, that where a promissory note has been given as security of a contract, it cannot be avoided by showing a partial failure of the consideration. The plaintiffs' counsel considered these principles so clearly established at common law, that but little pains were taken on the argument. But as it appears to the court, that the rule is not clearly established, and that the cases turn on distinctions which are neither obvious nor just, he is bound to distrust his own opinion, and to investigate the subject more thoroughly. A careful examination of all the cases, has fully confirmed his first impression.

The first case is *Power* vs. *Wells, Coup.* 818. This was an action for money had and received, brought to recover the sum of 21

pounds, the difference paid by the plaintiff upon the exchange of a mare of his for a horse of the defendant. The horse was warranted sound, but proved unsound. The defendant refused to take back the horse. The court of king's bench decided, that the warranty could not be tried in this form of action.

In *Weston* vs. *Downes*, *Dougl.* 23, it was again decided, that when the contract continued open, there must be a special action on the case.

In *Towers* vs. *Barrett*, 1 *T. R.* 133, the above cases were held to be clear law. In this case, *Buller*, J. said, that "the distinction between those cases where the contract is open, and where it is not so, is this; if the contract be rescinded, either as in this case, by the original terms of the contract, where no act remains to be done by the defendant himself, or by a subsequent assent by the defendant, the plaintiff is entitled to recover back his whole money; and then an action for money had and received will lie. But if the contract continue open, the plaintiff's demand is not for the whole sum, but for damages only arising out of that contract." In another case cited by *Buller*, J. he held, that if the plaintiff

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would rescind the contract, he must do it in a reasonable time.

These cases were all decided while Lord *Mansfield* and Mr. Justice *Buller* were on the bench. They certainly establish this point, that a purchaser cannot keep the thing, and recover back the price. If he cannot recover back the money which he has paid, he cannot retain the price unpaid. For a claim for damages merely, though arising out of the same contract, will, at common law, furnish no defence to an action on the contract for the price. If the contract be not rescinded, it must be enforced. An action for damages is founded on the contract, and in affirmance of it; as is also an action for the price. Whereas, an action for money had and received supposes the contract to be rescinded, as does also a defence to the payment of the price.

The authority of these cases was fully recognised by the court of common pleas, in the case of *Lewis* vs. *Cosgrave*, 2 *Taunt.* 2. This was an action on a check given for the price of a horse, sold under a warranty of soundness. *Heath*, J. who tried the cause, was of opinion, that as the plaintiff had re-

fused to take back the horse, the contract was not rescinded; and that the defendant was bound to pay the amount of the check, and had his remedy by an action for the deceit. Afterwards, on a motion for a new trial, the judge observed, that on reviewing the evidence, there was clear proof that the plaintiff knew of the unsoundness of the horse, and the court held, that it was clearly a fraud, and made the rule absolute. In this case, it will be observed, that the plaintiff immediately offered to return the horse.

The distinction, between a simple non-performance and fraud, is certainly very well founded in the common law. In an action of covenant, where there are mutual and independent covenants, the non-performance by one party is no defence to the other. A covenant precedent may be pleaded in bar; but the non-performance by the plaintiff of a mutual and independent covenant cannot be pleaded in bar; and, in this case, the defendant is left to his cross action. But fraud in the plaintiff is a good bar. The rule is, that fraund vitiates all contracts, and no man can recover in a court of justice, upon a contract which he has obtained through his fraud: and

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any security taken upon such a contract may, in the hands of the party, be avoided. Where there is no fraud, however, and the contract is not rescinded, the non-performance by one party, in case of mutual and distinct covenants, is no excuse for the non-performance of the other. 3 *Lev.* 41, *Cole* vs. *Hallett*; *Cowp.* 56, *Howlet* vs. *Strickland*; *Dougl.* 690, *Kingston* vs. *Preston*. And fraud must always be alleged and proved, and is never presumed.

In *Hunt* vs. *Silk*, 5 *East*, 449, it was again decided by the court of king's bench, that where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*. In that case, Lord *Ellenborough* said, that there "was an intermediate occupation, or part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelve-month on the same account? The objection cannot be got rid of: the parties cannot be put *in statu quo*."

The principles established in the foregoing cases are again recognised in *Payne* vs. *Whale*,

7 *East*, 274. In *Curtis* vs. *Hannay*, 3 *Esp. N. P. C.* 83, Lord *Eldon* held, that to enable the purchaser of a warranted article to resist the payment of the price, he must return the article immediately upon discovering the defect, and in as good a condition as when sold. The same was decided by *Lawrence* J. in *Grimaldi* vs. *White*, 4 *Esp. N. P. C.* 95. In this case the judge said, that a person, having received an article under a specific contract, must either abide by it, or rescind it *in toto* by returning the thing sold; but he cannot keep the article received under such a specific contract, and for a certain price, and pay for it at a less price than that charged by the contract.

The case of *King* vs. *Boston*, 7 *East*, 481 *n.*, has been referred to by the court as establishing a strange anomaly in the English law. This case was cited in *Basten* vs. *Butter*, as having been decided by Lord *Kenyon* at *nisi prius* in 1789. It is certainly impossible to reconcile this case with those decided by *Buller*, J. at *nisi prius*, cited also in *Basten* vs. *Butter*, or with the cases here before cited. Supposing the case to be correctly reported, it merely proves, that Lord *Kenyon* held a dif-

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ferent opinion from Lords *Mansfield*, *Eldon* and *Ellenborough;* and from the judges *Buller*, *Ashurst*, *Willes*, *Lawrence*, *Heath*, Sir *James Mansfield*, and others. And it is only the opinion of Lord *Kenyon* at *nisi prius*, and has less weight than if delivered after an argument at bar. It may be further observed upon this case, that it is merely a loose note, taken by a member of the bar, of a cause tried before a jury in 1789, and first published in 1806. The case is also contrary to *Duffitt* vs. *James*, cited 7 *East*, 480, decided by Lord *Kenyon*, in 1788. This was an action to recover the amount of a surgeon's bill, and Lord *Kenyon* permitted the defendant to give evidence of unskilful treatment of him by the plaintiff; taking the distinction where the demand was for skill, where the question might be, whether the plaintiff was entitled to any thing or nothing, and where the action was for goods sold and delivered, or for other certain thing of value, not depending on skill; and considering the case before him as a mixed one, where the demand was part for skill as well as for medicine. Here the learned judge evidently acquiesces in the decisions of the court of king's bench; and it can hardly

be supposed that, in the next year, he should, at *nisi prius*, have decided a cause in direct opposition to these decisions.

The cases of *Basten* vs. *Butter*, 7 *East*, 479, and of *Farnsworth* vs. *Garrard*, 1 *Campb.* 38, were of a nature similar to that last cited. These were actions for work and labour, and materials found. They are in their nature essentially different from the contract of sale. In the contract of sale, if the article be not according to contract, it may be returned and the sale rescinded, and the parties put *in statu quo*. But where work and labour have been expended, and materials consumed, or changed from their original shape, the contract is executed, or partially so, and the parties cannot be put *in statu quo*. And this is without any default in the party injured. The person, therefore, who employs the workmen, has not the power of doing what justice requires of a vendee. He has nothing to return. He has not the power of restoring things to their original situation; and, therefore, it is not required of him. It is immaterial, then, to the merits of this question to inquire, whether there be a difference, in an action for work and labour, between the defence to an

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action upon a special contract for a certain price, and to an action on a *quantum meruit*. The better opinion seems to be, that there is a difference; and that, where a certain price has been stipulated, the plaintiff is not to be met with an objection, that the work has been badly performed. Whereas, on a *quantum meruit*, the plaintiff can recover only what he reasonably deserves to have; and if, through his fault, the defendant has derived no benefit, he can recover nothing. But it will not follow from this, that the rights of the defendant are made to depend, in a great measure, on the form of action which the plaintiff selects. Where there is a special contract for a fixed price, the party must sue on the special contract, and can recover nothing but the price agreed on. He can only sue on a *quantum meruit*, where there is no fixed price. So, on a sale of goods, if no price has been agreed on, the vendor may declare on a *quantum valebant*; but, where there is a contract for a certain price, he can sue for that alone.

In *Fisher* vs. *Samuda*, 1 *Campb.* 193, Lord *Ellenborough* held it to be the duty of the purchaser of any commodity, immediately on discovering that it was not according to order,

and unfit for the purpose for which it was intended, to return it to the vendor, or give him notice to take it back. In that case, the plaintiff knew in July, that the beer was unfit to be exported; yet did not intimate this to the defendants before December. Under these circumstances, said Lord *Ellenborough*, the plaintiff must be considered as assenting to its being of good quality.

The plaintiffs rely upon these cases as establishing a principle which excludes this defence; and they believe, that if any rule be clearly and certainly established in the common law, that, for which they contend, is so established. If this be true, the parties to this suit have nothing to do with the reasonableness or equity of the rule. Their contract has been made in a country governed by the common law, and with reference to that law, and must be controlled by it. But is it possible, that this is merely a technical rule, and not founded in substantial justice? Can a purchaser be permitted, in justice, to retain the thing sold, and to refuse to pay for it? If the seller has not properly performed his part of the contract, whereby the purchaser is injured, there will be a claim for damages. *But*

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damages cannot be set off. By the laws of this state, derived from Roman law, the price of an article may, in certain cases, be diminished, provided an action for that purpose be brought within a year. But the action *quanti minoris* is unknown to the common law. According to that law, where an article has been sold under a special contract for a fixed price, that price must be paid, or nothing, and the sale rescinded; and no court, either of law or equity, has power to change the terms of the contract, or substitute a new one for that which the parties have made.

It is now nearly three years since this note became due, and two years since the last payment. During all this time, the defendants have kept the engine, of whose defects they complain. They have given no notice to the plaintiffs of its deficiencies, nor have they offered to return it. During one year, by their own showing, they have used it; and if, as is alleged, they have since laid it aside as useless, the use may have been lost to them, but has been equally lost to the plaintiffs. The engine may not have been sufficient for the defendants' boat, and yet it might have been worth the full purchase money to the

plaintiffs. If, when the alleged defect was first discovered, it had been returned, the contract might have been rescinded, without damage to either party; but now, as observed by Lord *Ellenborough* in *Fisher* vs. *Samuda*, there has been a part execution; the parties cannot be put *in statu quo*. In that case, the judge considered the conduct of the plaintiff as amounting to an acquiescence in the performance of the contract on the part of the defendants. Certainly the facts, admitted by the defendants in this cause, present a much stronger case of acquiescence.

The other point made by the plaintiffs, turns upon the security. It is admitted, that between the original parties, the consideration may be inquired into; and that, if it should appear the note was given without consideration, or upon an illegal consideration, or upon a consideration which has wholly failed—it will be a good defence. The consideration may consist in either an advantage to the drawer, or a loss to the payee. In this case, the failure of consideration has been only partial, according to the case made by the answer and affidavit. It could only become total, by restoring the engine and rescinding

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the contract. The defendants have had some use of it; and although it may have been laid aside, as of no further use to them, it might have been of value to the plaintiffs, if returned in due time. Will then a partial failure of consideration, be a defence to an action on the note?

Morgan vs. *Richardson*, 1 *Campb.* 40 *n.* was an action against the acceptor of a bill of exchange at the suit of the drawer, the bill being payable to his own order. The defence was, that the bill had been accepted for the price of some hams bought by the defendant from the plaintiffs, to be sent to the East Indies; and that the hams had turned out so very bad, that they were almost quite unmarketable. Lord *Ellenborough* held, that although where the consideration of a bill failed entirely, this will be a sufficient defence to an action upon it by the original party, it is no defence to such action, that the consideration fails partially; but that, under such circumstances, the giver of the bill must take his remedy by an action against the person to whom it is given. In *Fleming* vs. *Simpson*, 1 *Campb.* 40 *n.*, he decided the same point; and also, in *Tye* vs. *Gwynne*, 2 *Campb.* 346. In the case of *Green-*

leaf vs. *Cook*, 2 *Wheaton*, 13, the supreme court of the United States also decided, that a partial failure of consideration is no defence to an action on a promissory note. In this case, Ch. J. *Marshall* says, "without deciding whether, after receiving a deed, the defendant could avail himself of even a total failure of consideration, the court is of opinion, that to make it a good defence, in any case, the failure must be total. The prior mortgage of the premises, and the decree of foreclosure, do not produce a total failure of consideration. The equity of redemption may be worth something: this court cannot say how much; nor is the inquiry a proper one in a court of law, in an action on the note. If the defendant be entitled to any relief, it is not in this action."

It is said that the rules of the common law have been modified, or limited, by decisions of some of the state courts in the United States, in such manner as to let in the defence here made by the defendants. So far as these decisions are supported by legal arguments, they are entitled to respect; but they have no particular authority out of the states where they were decided. In the case of *Steigleman* vs.

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Jeffries, 1 *Seargt. & Rawle*, 477, the supreme court of Pennsylvania admit that, by the common law, such a defence, as is here made, could not be supported; but they allow it under a statute of that state. Certainly, this statute can have no authority in Kentucky, where this note was drawn; and there is nothing in this record to justify the conclusion, that the contract for the steam engine was made in Pennsylvania. It is true, that three of the plaintiffs reside in Pennsylvania; but the contract, on which they sue, was made in Kentucky, and with reference to the laws of that state. If an act of assembly of Pennsylvania allows unliquidated damages to be set off to an action, it does not follow that the same can be done in Kentucky, where this contract was made; nor in Louisiana, where the suit is brought.

The strongest case cited, on the part of the defendants, is that of *Taft* vs. *the inhabitants of Montague*, 14 *Mass. Rep.* 282.—That case is, however, very distinguishable from this. That was on a contract for building a bridge in a particular manner, and for a certain price. The work was done unfaithfully, and the bridge was carried away by a freshet. The

court held, that the plaintiff could not recover. In delivering the opinion of the court, the judge distinguishes the case from that of *Everett* vs. *Gray*, 1 *Mass. Rep.* 101, which was on a contract of sale, where the goods had been accepted; whereas in this case there had been no acceptance. *Everett* vs. *Gray*, was an action brought to recover the price of 98 gun-locks. Defence, that they were worth nothing. Held, that as the defendant had accepted and retained the locks, he could not make this defence.

The two cases cited from the *New-York Reports*, *Beecker* vs. *Vrooman*, 13 *John.* 302, and *Sill* vs. *Rood*, 15 *John.* 230, were both cases of fraud. The first was an action on the contract—the second on two promissory notes. In the last case, the evidence offered was, that the notes were given in payment for a shearing machine, sold by the plaintiff to the defendant; that the plaintiff made certain representations with respect to the usefulness of the machine, which were utterly false and that known to him at the time, and that the machine was, in fact, worth nothing and totally useless. The court held, that the evidence ought to have been received, and said, that

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"if the notes in question were procured upon such fraudulent representations, they were utterly void and without consideration, and there never was any cause of action." This, then, was not a case of partial failure of consideration, but of an original want of consideration, the notes having been fraudulently obtained.

The case of *Delany* vs. *Vaughan*, 3 *Bibb*. 379, decided by the court of appeals in Kentucky, was also a case of fraud. It was an action on a contract, to recover the price of a slave—and the defence was, fraud in the seller. The court say, expressly, that "to authorize a verdict in favour of the defendant, it was indispensable for him to establish a fraud, attendant with such circumstances as would make void the contract." This is, therefore, an authority for the plaintiffs in this cause, and not against them. In another case, reported in the same book, *Wallace* vs. *Barlow's administrators*, 3 *Bibb*, 168, the same court held, in an action of covenant, that a plea going to part of the consideration only, was bad.

These are all the common law cases which have been cited. None of them go the length of admitting this defence; for even *King* vs.

Boston, was an action on the contract, and not on a bill or note; and it may be safely affirmed, that in a court of common law, the evidence here offered has never been admitted as a defence to an action such as this.

On the argument of this cause, it was conceded, that it must be determined according to the principles of the common law—such was the impression of the counsel for both parties; and no intimation to the contrary fell from the court. Undoubtedly, the rights of the parties arising out of their contract, the merits of the question, must be determined according to the laws of the country where the contract was made. Whether this contract be open or rescinded, must be ascertained by a reference to those laws; and we must look to the same laws to decide, whether either party may now, and under what circumstances, rescind the contract—whether the matter set forth in the defendants' answer, the non-performance by the plaintiffs, gives to the defendants any claim upon the plaintiffs; and whether that claim be for a certain sum, or for uncertain damages, must also be determined *secundum legem loci contractus.* The form of action, the nature of process, and the

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rules of pleading, will be directed by the *lex fori*. In this case, the common law shows the claim of the defendants to be for uncertain damages; and if, by the laws of Louisiana, uncertain damages could be pleaded, by way of compensation, it might be done in this case. But the law only admits of compensation between debts equally liquidated, and not between a certain debt and uncertain damages. *Civil Code*, 293, *art.* 191. And there is no distinction, in favour of the case, where the claim for damages arises out of the same transaction as the certain debt. Can there be a doubt, that this is an attempt to set-off unliquidated damages? The contract was originally good; it was made upon a sufficient consideration; has not been rescinded; and the defendants cannot be allowed, at this time, to rescind it. They charge the plaintiffs with an imperfect performance of the contract, which was the consideration of this note; and, if the facts stated be true, they have a claim for damages; but neither by the common law nor by the civil law, can these damages be set-off. In the case of *Winchester* vs. *Hackley*, 2 *Cranch*, 342, the supreme court of the United States decided, that the defendant could not set-off a

claim for bad debts, made by the misconduct of the plaintiff in selling the defendant's goods as factor, the plaintiff not having guaranteed those debts; being of opinion, that such misconduct was proper to be inquired into in a suit for that purpose—and in that case the set-off arose out of the same transaction as the suit.

The cases cited from 10 *Martin*, 662. 11 *id.* 530, 721 & 751, are not denied. They relate to the process or form of proceeding. Whether a suit can be commenced by attachment, or by holding the defendant to bail, must be determined by the laws of the state where the action is brought. So interrogatories may be put to a party here, though it could only be done in other states, by filing a bill in chancery for a discovery. It is not pretended, that, in a suit brought here, upon a contract made in a common law state, the distinctions, between the jurisdiction of a court of common law and a court of chancery, are to be observed. If, in this case, the defendants could have been relieved in chancery in Kentucky, either by enjoining the judgment of the court of law, or in any other shape, they may be relieved here. That is, if they could have been re-

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lieved against this suit. But the circumstance of their having a separate right of action against the plaintiffs, will not have the same effect—unless this proposition can be established, that if A sues B here, upon a note made in Kentucky, in consideration of the sale of 100 hogsheads of tobacco, B can defend himself against this suit, by showing, that in a distinct contract, made at another time, for the sale of a steam-boat, he has sustained damage through the default of A.

The cases of *Moore's Assignee* vs. *King & al. ante*, 262, and of *Le Blanc* vs. *Sanglair & al., ante*, 402, were upon contracts made in this state, and turn upon principles peculiar to the civil law. The object of the redhibitory action is to rescind the sale, on account of some defect in the thing sold, and to recover back the price. The object of the action *quanti minoris* is to obtain a diminution of the price, the purchaser retaining the article. *Civil Code*, 356, *art.* 65, 66, 68, 70.—Either of these actions must be brought within six months from the time the defect has been discovered, and, at all events, within a year from the time of sale. The equity of these actions may be used as a defence to an ac-

tion for the price; and, upon this principle, the two last mentioned cases were decided. The defence was to the payment of the price; and, in the first action, a diminution was allowed, and, in the second, a total rescission of the sale. Neither of these actions are known to the common law. When there is a breach of contract, the vendor can only rescind the sale, by returning the article; but he can, in no case, as has been shown, retain the thing, and refuse to pay the price, or any part thereof. The defence, in the two cases in 12 *Martin*, did not turn upon matter of form, but upon the nature of the contract, as regulated by our laws. In one case, it was a defence to the whole action, showing a right to rescind the sale and a total failure of consideration. In the other case, showing a right to reduce the amount of the price sued for. In neither case, was it an attempt to set off damages.—Suppose, that either of these actions had been brought after the expiration of a year; could the defence have been sustained?

To prove that this defence may be made, these authorities have been cited; *Partida*, 3, *tit.* 10, *l.* 5. *Cur. Phil. p.* 1, § 15, and *Febrero, p.* 2, *lib.* 3, *c.* 1, § 6, *n.* 224–226. The *fifth* law of

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the title of the *Partidas* mentioned, must have been quoted by mistake for the *fourth*; for, certainly, the fifth law has no bearing on this case. The fourth law of the tenth title of the third *Partida*, is the foundation of the doctrine quoted from the *Curia Phillippica* and *Febrero*. It is this part of the Spanish law which gives to the defendant the right of reconvention, which *Febrero* defines as follows: *La reconvencion es segunda convencion, mutua petition, ó nueva demanda que el reo pone al actor en vista de la que éste le puso, p.* 2, *l.* 3. *c.* 1. § 6. *n.* 223. In the same number *Febrero* says, *pero no se permite al reo excomulgado que reconvenga al actor, pues aunque puede comparecer en juicio para excepcionar y defenderse, no puede para intentar accion, qual es la reconvencion.* It seems, then, that this right is not in nature of an exception, or a defence, but of a cross action. Such seems to be the law. *Partida*, 3, 2, 32. *Partida*, 3, 10, 4. *Juan de Hevia* also says, that the plaintiff has nine days to make exceptions to this cross action. *Cur. Phil. p.* 1. § 15. *n.* 10, 11. This shows it to be an action; for peremptory exceptions are made to actions, and not to exceptions. The fact is, that this was a right, which the Spanish law gave to the defendant,

to bring a cross action against the plaintiff, before the judge who held cognizance of the principal cause, and to whose competency the plaintiff could not except; which cross action was to proceed *pari passu* with the principal case; and both were to be determined at the same time, either by one judgment, or by separate judgments, as the case might require. The cross action might arise out of any other transaction, than that which was the cause of the original suit; it might be, either for a specific debt, or for uncertain damages; and, in the cross action, a larger sum might be recovered, than in the principal action. *Febrero*, 2, *l.* 3, *c.* 1, § 6, *n.* 225, 226, 243.

Supposing this to be an action, the law requires that it be presented to the court by petition, and that the plaintiffs be cited to answer it. Neither has been done in this case; and the latter could not be done; because no citation could be served on the plaintiffs.—Nor is the right of action set forth with that certainty which the law requires. But, after all, is this law in force in *Louisiana?* The translators of the *Partidas* say, that it is not; and the committee, to whom the translation was referred by the legislature, say the same.

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If it be a mode of discharging a contract, or a defence to an action on a contract, some provision on the subject would probably have been found in the *Civil Code*, provided it was intended the law should continue in force. If this law had been considered by the bench, or the bar, as in force, we should have found some trace of it in the reports. If it be in force, the act of the legislature, passed last session, on the subject of compensation, was wholly unnecessary; for, by this mode, the defendant might have recovered the excess of the debt due to him over that due to the plaintiff. And as this proceeding avoids all difficulty about unliquidated damages, it is singular, that recourse should not have been had to it, if it were believed it could be done.

[For the opinion of the court in the above cause, see *Post.*]

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The opinion of the inferior court, on a question of fact, prevails in the supreme courts, unless manifestly erroneous.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This appeal is taken from a decision of the judge of the first instance refusing to

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dissolve an attachment, which had been prayed for on the grounds that the facts stated in the petition were untrue.

Strong proof ought to be required, on a motion to dissolve an attachment.

The testimony, taken in the court below, to disprove the allegation of an intention to permanently remove from the state, comes up with the record, and has been perused by us. We agree in the conclusion of the district judge, whose decision, on questions of fact, always prevails in this court, unless manifestly erroneous. The evidence certainly renders the matter doubtful; but the court below judged soundly in requiring strong proof in a case of this kind; for, a mistake in dissolving, might cause the plaintiff to lose his debt, while an error on the other side could produce no injury, except compelling the defendant to bring an action on the bond, which the law has provided for his security, in case the attachment was illegally taken out.

It is therefore decreed, that the judgment of the district court be affirmed with costs.

Smith for the plaintiffs, *Seghers* for the defendant.

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APPEAL from the court of the first district.

Every thing in judicial proceedings, is presumed to have been correctly done.

MATHEWS, J. delivered the opinion of the court. In this case the plaintiffs claim title to the land described in their petition, as heirs to their father. They state, in an amendment to the pleadings, that he disappeared in the year 1799, and has not since been heard of. The right of the ancestor to the property in dispute, is not contested; as the defendants claim by virtue of title derived from him, through Mad. Trepagnier, the mother of the plaintiffs, to whom it is alleged to have been adjudicated by a competent tribunal of the Spanish government, while in the exercise of rightful sovereignty and jurisdiction over this country.

The first and most important inquiry, necessary to a just decision of the cause, relates to the conclusiveness of that adjudication, on the rights of the present contending parties. The manner in which it was made, and the evidence on which the proceeding of the Spanish tribunal were founded, do not fully appear, in consequence of the loss of the record, which contained that history. To sup-

ply these defects, testimonial proof has been resorted to; and it must be presumed, properly admitted, as no objection seems to have been made to its introduction. This proof establishes the fact of an adjudication of the property of the father of the plaintiffs to their mother; and if legally made, by competent authority, certainly transferred it in full title and dominion to her. But the legality of that decision cannot here be inquired into, without violating principles recognised by this court in the cases of *Aubry & wife* vs. *Folse & wife*, and *Dufour* vs. *Camfranc*, which were settled after much deliberation, and which we still believe to be correct and sound. See 11 *Martin*, 308 and 608.

As the judgment, by which Mad. Trepagnier acquired title to the property now in dispute, is not open to examination, the evidence on which it was based, is no more subject to review than the law. Every thing must be presumed to have been properly conducted, and that Trepagnier was, *quoad* the proceedings in that case dead in 1799.

The widow, who sold to the defendants, having acquired the property by the adjudication of the Spanish tribunal, and having re-

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gularly transferred it to them, we are of opinion, that they hold under a valid title, and that there is no error in the judgment of the district court.

It is therefore ordered, adjudged and decreed, that said judgment be affirmed with costs.

Moreau for the plaintiffs, *Duncan* for the defendants.

DRESSER vs. *COX.*

An appeal from the grant of a new trial (before final judgment) is premature.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The defendant and appellee insists on the dismissal of the appeal, on the ground of its having been prematurely taken, (*i. e.* before the final judgment was given) on the award of a new trial, the district court having been of opinion, that the verdict was contrary to evidence, and the damages excessive.

The counsel for the plaintiff and appellant urges, that the action was grounded on a tort, and there had been two verdicts against the defendant, and that the plaintiff is without

remedy, unless this court interferes, and he will be driven to the necessity of dismissing his suit and instituting it in the parish court; that as this court has sustained appeals from *refusal* of a new trial, there cannot be any doubt of its authority, and consequent duty, of revising decisions by which a new trial is granted.

The case of a court so obstinately persisting in setting aside a verdict, as to drive suitors out of it, is, we trust, a barely possible one; but neither the constitution nor the laws have vested us with the power of remedying it.

It is true, the constitution has vested the supreme court with the power of revising judgments and decisions, in civil cases, of a certain value; but the legislature has given the appeal from *final* judgments only, and this court has declared it considered as such, not only the judgments which put an end to the suit, in the inferior court, but all others (given in the course of proceedings) that work an irreparable injury.

In a case by attachment, the judgment which dissolves the attachment and loosens the property attached, is of the latter kind,

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and the party injured may appeal from it, because it is important for him to prevent its being carried into immediate effect, in the only way which the law allows, *i. e.* by an appeal; for were he to wait for the conclusion of the suit, and then appeal, the property attached would no longer be susceptible of being made answerable to him, if the supreme court were of opinion that the inferior court erred in discharging it.

In all cases, in which the like irreparable injury does not result from any other than a final judgment, the party is bound to wait till the case has been completely acted upon by the inferior court; because, this court may give him complete relief, in the ordinary course of the suit, when the case comes up, and it is not unlikely that the final issue of the suit in the inferior court, as may render it unnecessary to pray an appeal.

So in the present case, if, as the appellant urges, the new trial was improperly awarded, and the error is remediable here, we may likely give relief, by giving that judgment which, in our opinion, the district court ought to have given as the first or any subsequent verdict.

The plaintiff, therefore, ought to have de-

layed his appeal in this case, till there was a final judgment.

If it be true, that the plaintiff needs the interference of a superior court to prevent injustice by the improper delay of the district court, to give final judgment, or by too easily awarding new trials, we cannot come to his aid, for this tribunal has not been erected into a court to quicken or direct the conduct of other judges.

It is therefore ordered, adjudged and decreed, that the appeal be dismissed with costs, and the cause remanded with directions to the district court to proceed therein; the costs of the appeal to be borne by the plaintiff and appellant.

Denis for the plaintiff, *Preston* for the defendant.

CROUSE vs. *DUFFIELD.*

APPEAL from the court of the first district.

A defendant, who does not plead in abatement, admits that his residence, and that of the plaintiff, is correctly sta-

MARTIN, J. delivered the opinion of the court. The plaintiff sues on a note of hand of the defendant, who pleaded the general is-

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sue. The note had the signature of Samuel Kinsway affixed thereto, as that of a subscribing witness.

Miller deposed, he knew Samuel Kinsway of Ohio, though slightly; he does not know that he is the person whose name appears on the note as a subscribing witness; he is unacquainted with his signature, or hand-writing.

Gilly deposed, he knew the defendant, and has seen his signature and hand-writing; but having been called on suddenly, without being apprized of the questions he was to answer, he does not feel disposed to declare, whether the signature on the note is that of the defendant; it does look very much like it; being spelt in the same way and with the same letters; it looks very much like the signature of the defendant, which he has seen, is spelt in the same manner; but he cannot swear to it.

Davidson deposed, the signature on the note resembles the defendant's hand-writing, which he has seen several times; he has never seen him write; he cannot positively swear it is the defendant's, but, to the best of his knowlege, he believes it is; he believes the defendant acknowleged he owed the money

ted in the petition.

If a note does not state, the place in which it was given, the court may presume that it was given at the place in which the maker and payee reside.

A subscribing witness, to a note given out of the state, is presumed to be out of the jurisdiction of its courts.

sued for; and told him, that, if he was cast in the suit, Cuchery was to repay him: from his conversation with the defendant, he has no doubt that he owes the money; he knew Samuel Kinsway, but not his hand-writing, he resides in the state of Ohio.

Gordon deposed, he has compared the signature at the foot of the note, with that on an affidavit sworn before him by the defendant, and believes it is in his hand-writing.

Two witnesses, appointed as experts, reported, they had compared the signature at the foot of the note and that of the defendant to the bail-bond, and believes both to be written by the same person.

There was judgment for the plaintiff, and the defendant appealed.

There are two bills of exceptions taken by the latter to the decision of the parish court, in overruling his objection to the introduction of witnesses, and the resort to experts to establish his signature—as, while there is a subscribing witness to the note, he ought to have been produced, or accounted for, before other evidence was resorted to.

Both parties are described, in the caption of the petition, to be resident in the state of

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Ohio. The defendant has not pleaded in abatement, that either of them was incorrectly described. The residence of the parties is, by law, required to be stated in the petition. When the defendant does not plead in abatement, that the right place of residence of all the parties is not stated, he admits that each is a resident of the place stated. Taking it, therefore, for granted, that both parties reside in Ohio, the presumption is, that it is in that state the note was executed (no place being mentioned in the note); and the presumption is also, that the person, whose name appears as that of a subscribing witness, was there at the time, and nothing shows that he ever came within this state. We, therefore, conclude, that the plaintiff could not avail himself of the process of the court in which he sued, to procure the attendance of this witness. This circumstance authorized a resort to the proof by experts.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Preston for the plaintiff, *Davezac* for the defendant.

TRUDEAU & AL. vs *SMITH'S SYNDICS.*

Whether the vendor's privilege be lost, if the deed be not recorded in the parish in which the land lies.

APPEAL from the court of the first district.

Workman, for the plaintiffs. The petitioners, who are the heirs of the late Zenon Trudeau, brought this suit to obtain the payment of a debt due to them by the insolvent, as a part of the price for which they had sold their plantation to him, and for which they contend that they are entitled to the vendor's privilege on the thing sold. This claim was opposed by Morrison and Whitehead, on the ground that the vendors are not entitled to this privilege, inasmuch, as they have not recorded the act from which it arises, in the manner which it is said the law prescribes. The court below decided in our favour, and the opposing parties have appealed from that decision.

The plantation in question is situated in the parish of St. Charles. The deed of sale, by the petitioners to Smith, was passed on the eighth day of October, in the year of our Lord one thousand eight hundred and sixteen, before the judge of the parish of St. James: it was recorded, however, in the office of the judge of St. Charles, on the seventeenth day of March, in the year of our Lord one thou-

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sand eight hundred and twenty-one; and in the office of the recorder of mortgages, in this city, on the twenty-sixth day of July following. Three instalments of the price, amounting to the sum of 75,000 dollars, were unpaid when Smith failed.

The privilege claimed in this case, is one of those considered by our laws, and by the general sentiment, as among the most sacred.

The right of the seller of immoveable property, to his lien upon it for the price unpaid, can hardly be taken away or impaired, without violating the principle of property itself. By the Roman lawyers it was held, that the property sold did not belong absolutely to the purchaser until the price was fully paid. However that matter may be among us, it is clear, from an attentive examination of our statutes, that the vendor's privilege, on the thing sold, is not one of those liens which requires to be recorded in order to be preserved.

It is maintained, in the first place, that the act of sale of this plantation, to Smith, can have no effect against the opposing creditors, who claim a preference under conventional and judicial mortgages; because it was not recorded in due time, according to the law of

the year one thousand eight hundred and ten, 3 *Martin's Dig.* 140. The seventh section of that statute declares, that "no notarial act, concerning immoveable property, shall have any effect against third persons, until the same shall have been recorded in the office of the judge of the parish where such immoveable property is situated." This law might have been invoked in favour of a *bona fide* third party, to whom the Trudeaus might have made a sale of the plantation, after they had sold it to Smith. But it can be of no use to our present antagonists, who claim as mortgagees of Smith. It is on the validity of the sale to him that their right, whatever it may be, to the proceeds of this property, depends: if the sale to Smith is invalid, as to them, Smith had no right whatever to mortgage the plantation in their favour.

The great error which pervades the whole argument on behalf of Morrison, lies in considering him as a *third party*. He is no third party, in the sense of the law. He claims under Smith, as a purchaser from Smith, or as Smith's heir might do: and he cannot therefore stand, with respect to the force and validity of his mortgage, in a better situation than

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Smith himself does or could do, with respect to the validity of his purchase.

The act of sale stipulates, that a portion of the price shall be paid down, and the remainder in four annual instalments; to secure which, the buyer consents to, and the seller reserves a mortgage and privilege on the estate.

Although the word mortgage is used in this, as in most other acts of the kind, it is evidently superfluous or even improper, unless the privileged mortgage be understood.

The mortgage, generally, is defined, by the *Code*, to be a contract by which a person affects the whole of his property, or only some part of it, in favour of another, for security of an engagement, but without divesting himself of the possession.

From this definition it follows, that a purchaser cannot grant a mortgage by the act of sale by which he acquires the property. Until that act is completed, the property does not belong to him. What is commonly called the vendor's mortgage in such cases, is really the right or the privilege, which is not granted by the purchaser, for as yet he has nothing in it to grant, but which is reserved by the seller with the purchaser's consent.

The *Civil Code*, 452, *art.* 4, divides mortgages, at first, into three classes, viz.—the conventional, the judicial, and the legal or tacit mortgage.—Afterwards, there is another classification of them, (*art.* 29)—into simple mortgage, and privileged mortgage. The simple mortgage includes the three sorts already specified. These three have this common character, that they give to the creditor no other preference of right, over his debtor's property, than that which the date of his title or of its recording affords to him; according to the rule, the first in time is paid first. But the fourth kind, the privileged mortgage, or, as it is otherwise called, the *privilege*, is that which derives from a privileged cause, which gives a preference over the creditors who have only a simple mortgage, though of a prior date. Such is the privilege of the vendor, *who has the preference over every other creditor* for his payment, on the real property he has sold—*Code, same art. last paragraph.* Between this last mentioned privilege, and the legal mortgage, there is another very important distinction, viz.—that the legal mortgage affects the whole of the debtor's immoveable property, while the vendor's privilege attaches only on the property

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sold. No two liens are more distinct in their nature and character, than that lien which has the effect of a legal mortgage, and that which the vendor possesses for the security of the price of his property.

The *Code*, 454, *art.* 16–17, enumerates several cases, where the legal mortgage takes place; and declares, that there is no legal mortgage, but in the cases directed by the law. It declares also, *art.* 27, that the legal mortgage is not required to be recorded. And again, in the section on the registering of mortgages, *p.* 464, *art.* 54, it expressly ordains, that privileges on moveables as well as on immoveables, and legal mortgages, (always discriminating between privileges, and legal mortgages) have their effect against third persons, without any necessity of being recorded. But afterwards, in the year 1813, the general assembly thought fit to make a different regulation—so far as respected legal mortgages only. They passed an act requiring those mortgages to be recorded, and declaring that all liens of any any nature whatever, having the effect of a legal mortgage, which should not be recorded agreeably to the provisions of this act, should be utterly

null and void, except between the parties thereto.

This is the act principally relied upon to defeat our claim. But it is evident from what I have already stated, that our case is not comprehended in this provision. Ours is the privilege accorded to the vendor of immoveables on the estate sold, pursuant to the provision of the *Civil Code*, 470, *art.* 75. We contend, that we have a privilege, not a legal mortgage, on the property in question. Our lien, on the one hand, is prior to all mortgages, whatever might be their date. This characteristic of the vendor's lien is evidently from its nature, independent of any legal provision: for the purchaser could not mortgage it, until after he had acquired it.—And, by a wise provision of the *Code*, 452, *art.* 7, he could only then mortgage it, subject to the conditions on which his right on it depended. On the other hand, we do not pretend, that our lien has the extensive effects of a legal mortgage. It does not, as a legal mortgage would do, affect the *whole* of the debtor's immoveable property. We claim our privilege only on the property sold.—Our privilege then, or privileged mortgage,

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is not the same, nor has it by any means the same effects, as a legal mortgage; it comes not therefore within the provisions relied upon of the act of the year 1813.

This court cannot say, that our privilege ought to have been recorded as a lien having the effect of a legal mortgage, unless they are prepared to adjudge, that if it had been recorded, as that act prescribes, it would have affected the whole of the debtor's immoveable property.

I am well aware, that in the Spanish writers on the subject of mortgage and privilege, a good deal of vagueness and confusion may be found. The privilege is sometimes called a legal or tacit mortgage. But even in the Spanish law, the nature and effects of these different species of liens, are clearly pointed out and discriminated, although their names are confounded. In our *Civil Code*, the names as well as the things themselves are kept perfectly distinct. The privilege, or privileged mortgage as it is sometimes called, is separated from all the other three species of mortgages—the conventional, the judicial and legal—by a boundary which cannot be mistaken. In the *Napoleon Code*, from which the

best part of our *Civil Code* is taken, the privilege is always denominated by that single word. Our legislators have probably thought that it might be proper to use the words, privileges and privileged mortgages, in order to distinguish the privilege on moveable, from the privilege on immoveable property.

The supposed intentions of the legislature are appealed to. What, it is asked, could they mean by a legal mortgage, but a mortgage imposed or created by law? When the words of a statute are of clear and precise signification, those words alone are to be regarded. The words of the statute have an evident reference to the definitions and distinctions of the *Civil Code*; and, if it were necessary, it were easy to show why the legislature did not comprise the privilege along with the legal and judicial mortgage. The act enumerates most of the different species of contracts, judgments, decrees, &c., having the effect of those kinds of mortgages, and then includes, in one sweeping clause, all liens whatever having the effect of a legal mortgage. Would it have been right, would it have been possible, to require the registry of all privileges in like manner? of the privileges of funeral charges, law charges,

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the charges for medical attendance and the like? But of all privileges, that of the vendor on the estate sold by him, for the price of it, seems the least to require being registered. It is a privilege which must appear manifest on the act of sale itself. If the seller acknowlege, in that act, that he has received the price, in the notary's presence—or out of it, with the proper renunciation of the exception *non numeratæ pecuniæ*—then there is an end of the vendor's privilege. If the price, or any part of it, appear due, then how can the privilege be unknown? Does any person of common prudence or understanding, purchase, or lend his money on the mortgage of property, without examining the title deeds? The privilege of a lawyer, a physician, a builder, may be hidden; but the privilege of a vendor can never be concealed from him who will take the trouble to make proper inquiries. You say, the deed to Smith was not registered in the proper office, and therefore you could not have cognizance of it. Why then did you lend your money, or accept of a security upon this plantation? It is not enough, as has been contended, to inquire what mortgages exist on an estate for which you are about to make a

contract. You must inquire whether the other party has any right to it, and how far he may lawfully dispose of it. Suppose our adversary, instead of taking a mortgage on, had purchased this estate, would such a purchase be held valid against the former vendor's privilege? If he examined the act of sale, he would have notice of the incumbrance. If he did not, he must take the property subject to all the risks arising from his own negligence and imprudence, if indeed something worse might not be imputable to one who would act in such a manner. Our citizens are already sufficiently addicted to hazardous speculations on property in this state. Let no undue encouragement be afforded to those speculations, in which fraud might act under the mask of carelessness.—I put an imaginary case, without designing to make any imputation in the present instance, in which, indeed, no fault appears beyond the imprudence of taking an insufficient security.

On behalf of the opposing party, claiming under a judicial mortgage, we are told that his case is particularly favourable. He obtained a judgment for a just debt. He saw that Smith had possession of a large estate—

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he gave him credit on it, and had no business to inquire into his titles. And why did he do so? Why did he not first inquire whether the estate was paid for? Is there any thing better known among us, than that such estates are usually sold on a long credit; and that the seller has a privilege upon them for the price due?

This court has already decided some cases under the act of the year 1813, agreeably to the principles I have endeavoured to maintain. In *Lafon* vs. *Sadler*, it was held, that the builder's privilege on the house built, was not comprehended within the provisions of that statute, and was therefore valid, though it was not recorded. This judgment was rendered in June, 1816; and the legislature, at their next session, amended the act of the year 1813, by ordaining, that in all cases exceeding $500, no architect, &c. should enjoy, with regard to a third party, any privilege, unless he should have entered into a written contract, and recorded it within the time prescribed by law. In the various acts which have been passed upon this subject, the legislature never think of requiring a record of the vendor's privilege. If they ever intended

to require such a record, it must have occurred to them on several occasions—as when they were amending the *Civil Code*, by ordaining that legal mortgages should be recorded; and, on the subject of the builder's privilege, when they passed the law of the year 1817, occasioned probably by the decision in *Lafon* vs. *Sadler*. The legislature thought, no doubt, that it was useless to insist upon the registry of a privilege which could not be concealed from any one who acted with ordinary caution.

The principle of the decision of *Lafon* vs. *Sadler*, has been confirmed by this court in the cases of *Millaudon* vs. *New-Orleans Water Company*, 11 *Martin*, 278, and *Jenkins* vs. *Nelson's Syndics*, *ibid.* 437.

To this claim of the vendor's privilege, is opposed, first, an act in favour of Morrison, which is considered as a mortgage. It is drawn in the common law form, viz. a deed of sale, defeasible on the payment of money. It is dated the 23d June, 1819; acknowleged in the Fayette circuit court, the 22d day of the same month and year—(there is an error, perhaps a clerical one, in the date,) and recorded in the parish of St. Charles, the 15th day of May, 1820.

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We maintain, that this deed is not valid as a mortgage, to affect immoveable property in this state. It is a principle of universal jurisprudence, that immoveable property can only be disposed of, agreeably to the laws of the state in which it is situated. Our code has made exceptions to this principle, in favour of certain wills and marriage-settlements; but not, I believe, in favour of any other contracts respecting real property. With regard to the contract of mortgage, our code is particularly rigid. It declares, *p.* 452, *art.* 6, that there is no conventional mortgage, except that which is expressly stipulated in the act of writing made between the parties; it is never understood, and is not inferred from the nature of the act. This provision, respecting the nature of the act, is as strict as that which declares that a mortgage, *verbally* stipulated, is not valid; and it would surely not be contended that a verbal mortgage, though it might be good in some other state, would bind real property in Louisiana. Our law has also ordained, *Act of the year* 1817, 124, § 9, that no conventional mortgage shall be valid, unless the sum, for which the same shall have been given, be certain and explicit. Now, in this deed to Mor-

rison, we find that although a sum is mentioned, to secure which the act is given, yet the amount really to be secured is uncertain, depending on the event of a law-suit.

This court, it is true, has decided in the case of *Baron* vs. *Phelan*, 4 *Martin*, 88, that a bill of sale, taken in connexion with another instrument of writing, by which it appeared that the property was given to secure the payment of a debt, could be considered only as a mortgage of that property. If this decision should still appear compatible with the prohibitory provision of the code which I have just cited, it must be on the ground that agreements are to be construed according to the manifest intentions of the parties. But, on the very same ground, this mortgage must be held void, according to the act of 1817.

For, on examining with attention the condition of defeasance, it will be seen that the sum, for which this mortgage was really given, was not certain at the time of executing the deed; that although a certain sum was stated, yet that it was the true and manifest intention of the parties, that the amount of it should ultimately depend upon a contingent event. So that, whether the decision of the court be

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for or against us on the first ground of exception, this act cannot be held valid as a mortgage, in this state.

The next opposition is on the part of Whitehead, who claims under a judgment duly recorded in the parish of St. Charles, May 17th, in the year 1821. Our deed of sale, the court will recollect, was recorded there on the 17th of March, of the same year. But it is objected, (and the fact is admitted by the attorney on record,) that this recording of ours, was made without any order of court. This circumstance can have no effect on the question of precedency of claims. If the law ever did intend that the vendor's privilege must be recorded, it is only, as the law itself declares, *Civil Code*, 464, *art.* 52, in order to protect the good faith of third persons, and to prevent fraud; and again, 1*st Martin's Digest*, *p.* 704, the legislature declare, in the last section of the very act on which our opponents rely, that the formality of recording prescribed by this act, is required solely for the benefit and information of the public. If the parish judge has recorded the deed, without being duly authorized to do so, he and he alone is blameable. The deed

once recorded, none of the evils, against which it was the sole purpose of the law to provide, can be apprehended. But, I feel so confident on the principle ground of our defence against Morrison's claim, which will equally support us against the claim of Whitehead, that I do not suppose the court will feel it necessary to enter into any investigation of this last point.

Hennen, for the defendants. The questions now presented for the decision of the court, arise from the conflicting claims made by two creditors to the proceeds of a plantation, the property of I. K. Smith, an insolvent debtor: James Morrison, on the one part, claiming 15,000 dollars out of them, by virtue of *a mortgage, the first recorded in the parish where the land is situated*; and the heirs of Trudeau, on the other, asserting their right to the whole by *privilege as vendors*.

The facts of the case are few and undisputed; the law only, arising thereon, is the source of controversy.

On the 8th October, 1816, the heirs of Trudeau sold to the insolvent, by a deed of sale given before the parish judge of the parish of St. James, the tract of land situated in the parish of St. Charles; the proceeds of which

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are now in litigation. By the deed a special mortgage was reserved in favour of the vendors on the premises; but it was not recorded in the parish of St. Charles (where the land is situated) until the 17th of March, 1821.

On the other hand, James Morrison urges, that he should be paid in priority to the heirs of Trudeau, the amount of his mortgage, which was duly executed in the state of Kentucky, in the common law form usual in that state, on the 23d of June, 1819; and recorded, by order of the judge of the district court, in the parish of St. Charles (where the land is situated) on the 15th May, 1820; nearly one year prior to the recording of the mortgage of the heirs of Trudeau.

Two instalments of the purchase-money, amounting to 50,000 dollars, had been paid by Smith previously to his failure; since which the heirs of Trudeau, by an order of seizure and sale, granted on the mortgage stipulated in the deed of sale, have caused to be sold by the sheriff, the plantation for $80,000; a sum barely sufficient to cover their demand: and have become themselves the purchasers and possessors of the plantation; which was the only property in the state that the syndic

if the insolvent has received for the payment of the just debts of his numerous creditors.

A judgment against the syndic has been obtained by Morrison, for the amount of his mortgage; which he insists should be paid by the syndic, out of the proceeds of the sale of the plantation, prior to the payment of any other creditor.

Such in substance are the facts, out of which the present controversy springs; the solution of which involves the decision of but a single point of law: *Does the vendor of real estate preserve his privilege thereon, for the purchase-money unpaid, if he neglects to record the deed, which creates his privilege, in the parish where the land is situated?* If this question is solved in the negative, as I maintain it should be, there will be no difficulty on any incidental question arising out of the cause.

The privilege of the vendor on real estate cannot exist under our laws, in any other way than by the deed of sale. For as lands can be conveyed by deed only, (*Civ. Code*, 311, *art.* 241,) it follows as a corollary that the privilege which is created by the contract of sale, cannot exist or be proven in any other way than by the contract itself. But we may ad-

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vance a step further, and assert, that if on the face of the deed the privilege does not exist, the proof of it could not be drawn from other sources, such as a counter-letter, &c.; and if the vendor has acknowledged the payment of the purchase-money, no privilege would exist for the payment of the notes &c., which may have been taken instead of money. These principles are fully established by various authorities; *Domat, l.* 3, *tit.* 1, § 5, *n.* 4, in notis; 1 *Persil, Régime Hypothécaire*, 158, 9. 10 *Merlin. Répertoire de Jurisprudence*, 29, *verbo Privilége de Créance.* It then may be safely asserted, that the privilege of a vendor of real estate, as the accessory of the contract of sale, derives as well its existence, as its force from the contract only, as far as third persons are concerned. The contract of sale may subsist in full force, while the privilege of the vendor may have been waived or destroyed. With these principles established, let us look at the positive provisions of the statutes of the state on the subject. The first act of the legislature, to which I will call the attention of the court, is that of 1810. 3 *Martin's Dig.* 138. By the fourth section of this act, "no instrument stipulating a mortgage shall have any

effect against third persons, except from the day on which the same shall have been recorded in the office of the judge of the parish where the hypothecated property is situated." The mortgage therefore of the heirs of Trudeau, which was stipulated in their favour by the insolvent, is clearly of no effect or validity against his creditors, who assuredly are third persons. And though the heirs, in their petition, have availed themselves of this mortgage to obtain thereon the order of sale of the plantation, under which they have re-entered into possession; so plain are the words of this section of the statute, that no claim by virtue of their mortgage has been urged: indeed, it appears to be abandoned.

It is the privilege of vendors, however, which their counsel insists has not been lost. Let us then examine that hold. The seventh section of that act, 3 *Martin's Digest*, 140, goes on to enact, that "no notarial act concerning immoveable property shall have any effect against third persons, until the same shall have been recorded in the office of the judge of the parish, where such immoveable property is situated." By this section it is evident, that between the

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contracting parties notarial acts or deeds of sale, are to have full validity and effect; as to them they are good to all intents and purposes. But not so, as regards third persons. Now the privilege of the vendors of the plantation to the insolvent, as an accessory of the contract of sale, was good against him; but I insist that, from the plain words of the act, it can have no force against third persons. It is only by virtue of the notarial act of sale, that this privilege can be established or enforced, as I trust I have already shown. The heirs of Trudeau must resort to the notarial act of sale, as the only means of establishing their privilege; and against their vendee they had a right to use it; but against third persons, "it shall have no effect," whatever may have been its validity against the contracting party. The argument drawn from this section appears to me perfectly conclusive against the privilege asserted by the heirs of Trudeau against Morrison, a third party. The only answer attempted to be given by their counsel, to the conclusion which I have drawn from it, is that if this deed is not valid against third persons, then the sale itself to Smith is not valid; and he could not mortgage the estate to Morrison. But

this by no means follows. On the contrary, the deed of sale is valid so far as it conveyed the estate to our debtor. The statute does not make the act of no effect whatever; but only declares that it shall have no effect *against* third persons. The object of the statute was to protect and favour third persons; not to produce an effect *against* them, but to do something *for* them. It is not the sale, that Morrison wishes to set aside and annul: it is that privilege which the heirs of Trudeau say they are entitled to by the deed, for the payment of the balance of the purchase-money, he combats; it is that this privilege may have no effect *against* his mortgage duly recorded, that the statute is invoked; and this court will pronounce, I trust, that it shall not have any effect against him, as the statute directs. But it is said, that the great error of the counsel of Morrison is in considering him a third party. Certainly, there cannot be a greater error, than to consider Morrison as one of the parties to the deed; who alone by the provisions of the statute are to be bound by it. The statute protects all persons but parties; and whoever was not a party to the deed, must be

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considered as included under the denomination of "third persons."

The creditors, both of Trudeau and of Smith, have a right, as third persons, to urge the provisions of the statute, so far as the notarial act of sale might have any effect against them. The counsel of the heirs of Trudeau admit that their creditors might do so; and I think it too plain, to need further argument, that the creditors of Smith have the same right; for both classes of such creditors must be considered, as regards the contracting parties, third persons.

The counsel for the plaintiffs, however, insists that all privileges and legal mortgages have their effect against third persons, without any necessity of being recorded, according to the provisions of the *Civil Code*, 465, *art.* 54. *If such was the law, it has been repealed.* First, by the act of 1810, already cited, so far as privileges are created or exist by notarial acts, which are to have no effect against third persons unless recorded; and, secondly, by the act of 1813, 1 *Martin's Dig.* 700, which begins by enacting that all securities; sales of lands, or slaves made by public officers; all marriage contracts; all final judgments and

awards, shall be recorded within ten days, &c. in the office of the parish judge of the parish where they are to effect lands or slaves; and concludes in the following words; "and all sureties, sales, contracts, judgments, sentences or decrees aforesaid, and *all liens* of any nature whatever, having the effect of a legal mortgage, which shall not be recorded agreeably to the provisions of this act, shall be utterly null and void to all intents and purposes, except between the parties thereto."

My reasons for maintaining that this part of the *Code* was in part repealed by the act of 1810, have already been given. If any doubt could remain with respect to the intentions of the legislative act of that year, the subsequent act of 1813 has most assuredly rendered the subject perfectly clear. Privileges and legal mortgages by the ancient laws of the country, existed to so great an extent as to render the purchase of real estate and slaves in a high degree hazardous; and against the secret privileges and tacit mortgages, which might exist thereon, no diligence or foresight could provide for the security of the purchaser against all molestation. The evils attendant on such a state of things had long been felt and de-

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plored by the community; the act of 1810 remedied but a small portion of the evils existing; and in order to effectually and adequately put an end to them, the legislature enacted the statute of 1813, which requires *all liens* of any nature whatever, having the effect of a legal mortgage, to be recorded in order to give them any validity against third persons.

But the counsel for the plaintiffs contends, that the act of 1813, has not impaired their lien of vendors; and that such lien or privilege was not intended to be embraced by its provisions. His argument is founded on the definition of the word mortgage, found in our *Code*; and on the distinction which he thinks there is between a legal mortgage and the privilege of the vendor. That he has taken an erroneous view of this part of the subject, I propose next to show; and to satisfy the court that, as well by the act of 1813 as by that of 1810, the privilege of the vendor of real estate is lost, as regards third persons, if not recorded. The whole argument rests upon showing that the privilege of a vendor of real estate is something not included in the terms, "*a legal mortgage*;" for if such privilege is nothing in effect but a legal mortgage; *if it is a lien having*

the effect of a legal mortgage, the statute requires it to be recorded, to have any validity against third persons.

We are first referred to the definition of a mortgage in the *Civ. Code*, 453, *art.* 1. "The mortgage is a contract by which a person affects the whole of his property, or only some part of it, in favour of another, for security of an engagement, but without divesting himself of the possession thereof."

Nothing, certainly, can be more unfortunate than this definition. Instead of the definition of a *genus*, it gives that of a *species*; it is but the description of *a conventional mortgage*, when it should have included the other two species, *legal* and *judicial*. *Omnis difinitio in jure civili, periculosa est; rarum est enim, ut non subverti possit. Dig.* 50, 17, 202. Nothing, therefore, favourable to the argument of the counsel for the plaintiffs, can be deduced from such definition. Without regarding then this oversight in our legislators, let us examine into the division and classification which they have made of mortgages.

We are informed (*Civ. Code*, 653, *art.* 4) that there are three sorts of mortgages:

1. The conventional,

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2. The judicial, and

3. The legal or tacit.

Again, it is stated (*idem*, 457, *art.* 29) that under another view, mortgages may be divided into,

1. The simple mortgage, and

2. The privileged mortgage.

But furthermore, we learn (*ibid. art.* 30) that mortgages may be divided into,

1. The general mortgage, and

2. The special mortgage.

Now it is evident that all mortgages, of every nature or sort whatsoever, must be either *general* or *special;* that is, must effect some one *particular or special* immoveable; or, *in general*, all the immoveables of the debtor. The terms *general* and *special*, therefore, include all sorts of mortgages.

It is equally evident, I think, and undeniable that every mortgage of whatsoever nature or sort, must be either a *simple* or a *privileged* mortgage. The four terms, therefore, *general*, *special*, *simple*, and *privileged*, are merely descriptive of the nature or effects of the different sorts of mortgages; which are three, the *conventional*, the *judicial*, and the *legal*. This distribution and division of mortgages is that

of *Domat*, *l.* 3, *tit.* 1. § 2, from whom it would seem the framers of the *Code* intended to borrow it. There are, then, but three sorts of mortgages known to our *Code*; and under some one of the three, every mortgage may be classed, whether it is *general* or *special*, *simple* or *privileged*; which words are solely intended to mark the qualities that may attach to them.

Now *the privileged mortgage*, or as it is otherwise called *the privilege of the vendor*, *Civ. Code*, 457, *art.* 29, cannot be ranked either among the conventional or the judicial mortgages.—There is but one other class of mortgages in which it can be placed; *the legal*: and to that it evidently belongs.

"A legal mortgage (according to the definition of our *Civ. Code*, 454, *art.* 15) is that which proceeds from the law, without any express covenant of the parties; but which is, notwithstanding, grounded on a tacit consent, which the law presumes to have been given by him on whose property it grants this mortgage; therefore it is also called, in law, a tacit mortgage." This definition is as correct a description of the privileged mortgage, or privilege of the vendor, as language can give. The *Code* then proceeds to give various examples of

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the legal mortgage; but after enumerating many, cautions us against supposing that they are all. "To the divers sorts of legal mortgages mentioned in this title, must be added those which may have been omitted in the above enumeration, and which may have been established in other parts of the present *Code*."

It is worthy, however, of very particular remark, that among the number of legal mortgages enumerated directly following the definition of a legal mortgage, the framers of the *Code*, 457, *art.* 23. have placed an example of the privilege of the vendor of real estate. "Co-heirs have a legal or tacit mortgage on the property which has been the object of partition, from the day of that partition, for the warranty of their respective portions, as well as for the returns of money on the shares." For, on consideration of the nature of the contract of the partition among co-heirs, it is certain, that in the partition of real estate, they are mutually vendors and vendees; and therefore this tacit or legal mortgage is to secure the vendor his purchase-money. Such is the view taken of this mortgage by the civil law writers. *Ferriere, Dictionnaire de Droit, verbo Soulte.* "*Soulte, est une somme qui se paye en*

forme de supplément par un des copartageans à l'autre, pour faire par ce moyen que leurs lots soient égaux. Ainsi souvent dans un partage un immeuble est mis dans un lot, à la charge que celui auquel il échoira, sera obligé de recompenser les autres copartageans en argent, pour rendre toutes les portions égales.

Ce terme vient de solvere *; car c'est une espece de solution ou de payement qui se fait aux autres copartageans de la portion qu'ils pouvaient avoir dans un immeuble.*

Pour ce qui est du privilége de la soulte de partage il est sur le total de l'héritage qui la doit ; et non pas sur une partie seulement."

9 *Merlin, Répertoire de Jurisprudence, verbo Partage, 38 ; "Les biens composant le lot de chaque copartageant, sont hypothéqués par hypothèque privilégiée, à toutes les obligations qui dérivent du Partage, telles que sont le retour en deniers ou rentes dont ce lot est chargé, l'obligation de garantie envers les cohéritiers auxquels sont échus les autres lots, les rapports des sommes données ou prêtées à quelqu'un des cohéritiers, et enfin toutes les prestations personnelles dont un héritier peut être tenu envers ses cohéritiers."*

" Cette hypothèque privilégiée doit produire son effet dans le cas même où le Partage a été fait sous

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seing-privé." 10 *Merlin, Répertoire de Jurisprudence, verbo Privilége de Créance*, 13. "*Le cohéritier réclamant sur les immeubles de la succession, une soulte ou la valeur des biens dont il a été évincé, doit être considéré comme un vendeur d'une portion des biens qui devaient composer son lot; et qu'ainsi, son Privilége, à cet égard, se confond et s'identifie parfaitement avec celui du vendeur.*"

See also, 15 *Pandectes Francaises*, 183. 1 *Persil, Régime Hypothécaire*, 185. *Code Napoleon, n.* 2103, § 3.

But to return to the point which I have undertaken to establish; that the privilege of the vendor is included under the class of legal or tacit mortgages. This privilege is expressly termed a mortgage; *Civ. Code*, 457, *art.* 29; and the privilege of the vendor, used in the English text, is termed in the French, *l'hypothèque du vendeur*. In this point of view, the writers on jurisprudence have always regarded it; vain therefore is it for the counsel of the plaintiffs, to maintain that a privilege is something different from a mortgage. "*L'hypothèque, est un droit réel sur une chose appartenante au débiteur, qui tend à assurer l'exécution de l'obligation, au moyen de la préférence qu'elle attribue au créancier nanti de ce droit, sur les autres créanciers.*

La préférence a pour cause, ou la faveur due à la créance, ou la propriété, soit du contrat, soit de l'accomplissement des formes qui donnent à l'hypothèque son efficacité.

Cette différence dans les causes caractérise deux genres d'hypothèques, dont l'un conserve le nom d'hypothèque, et l'autre prend celui de Privilége.

Le Privilége n'est donc, à proprement parler, qu'une hypothèque privilégiée.

En effet, le Privilége est un droit accessoire à une créance, puisqu'il ne peut appartenir qu'à un créancier. Le Privilége est un droit réel sur une chose et sur le prix provenant de la vente de cette même chose. Ce droit réel affecte la chose engagée, de manière qu'il la suit dans les mains de tout possesseur, du moins lorsqu'elle est immobilière.

Tous ces avantages sont communs à l'hypothèque et au Privilége: leur caractère distinctif consiste en ce que les hypothèques prennent leur rang de la priorité de l'inscription ou du titre, au lieu que le Privilége obtient la préférence sur toutes les créances hypothécaires, lors même que le titre serait postérieur en date." 10 *Merlin, Répertoire de Jurisprudence, verbo Privilége de Créance*, 7.

The counsel for the plaintiffs, it is true, acknowledges, that the privilege of the vendor is a mortgage; but maintains that it is not in-

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cluded in the three sorts of mortgages, *conventional, judicial* and *legal*, into which the *Code* has divided all mortgages: and, in order to show that there must be *a fourth sort of mortgage*, he refers us to a definition, or quality, which he supposes will attach to all legal mortgages; *i. e.* that a legal or tacit mortgage affects all the estate of the debtor against whom it exists. But this is not true, certainly as it regards some of the tacit or legal mortgages mentioned by the *Code*, particularly as to that of co-heirs, *Civ. Code*, 457, *art.* 23, for the reasons already adduced by me, to prove that such legal or tacit mortgage is, in fact, nothing more than the privilege of the vendor of real estate. The argument then attempted to be drawn from this source by the counsel of the plaintiffs, must be considered as without foundation. And in contradiction to him, I may boldly assert, that the lien of the vendor of real estate and that of a co-heir, are not distinct in their nature and character, but perfectly analogous, if not identical; though the one is termed a privileged mortgage, and the other a tacit or legal mortgage.

All the distinctions and definitions by which it has been attempted to prove that there are

more than three sorts of mortgages known to our laws, having been shown to be unavailing; it must necessarily follow, that the title of mortgage created by an act of sale, must be ranked among legal or tacit mortgages.

To the instance already adduced from the *Civil Code*, of a vendor's privilege being termed a tacit or legal mortgage, another may be added from the Spanish law, which is still in full force; that of a minor on his real estate sold. 1 *Sala*, 385. *Part.* 5, 13, 25. Several other instances of what are termed in the *Civil Code*, *privileges*, or privileged mortgages, being denominated in the Spanish law, *tacit mortgages*, may be found in the *Curia Philipica*, 364, *Hypoteca*, *n.* 31, 32, 33 and 34. And in *Ferrari's Bibliotheca*, *verbo Hypotheca*, *n.* 1, 20.

It must appear then most satisfactorily, I apprehend, that the term *legal mortgage*, agreeably to the definition and use which is made of it in the *Civil Code*, and by the writers on the Spanish law, embraces mortgages which affect only a particular immoveable; and it should not be restricted to mortgages only, which affect the whole real estate.

We now, then, naturally arrive at the main part of the controversy. What mort-

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gages did the legislature mean to include under "all liens of any nature whatever, having the effect of a legal mortgage?" Not those only specified in the title of the *Civil Code*, which treats of legal mortgages; for we are told, *Civ. Code*, 456, *art.* 26, that some may have been omitted in the numeration there made; and therefore, all which may have been established in other parts of the *Code* are to be added. But to these, we must add, such as existed and were established by the Spanish law; for they were never repealed. We then may safely assert, that all legal or tacit mortgages established in any part of the *Civil Code*, or known to the Spanish law, were in the view of the legislature; and that it was intended to make them all "utterly null and void to all intents and purposes, except between the parties thereto," if not recorded agreeably to the provisions of the act of 1813.

It is not barely *legal mortgages*, whether established by the *Civil Code*, or the Spanish *Jurisprudence*, that are declared to be null if not recorded; but *every* "*lien* of any nature whatever, *having the effect* of a legal mortgage." Legal mortgages, technically so termed, must be recorded; all liens also, which have the

same effect. The term *lien*, is familiar to the common law; and in its most usual acceptation signifies an obligation, tie, or claim annexed to, or attaching upon, any property; without satisfying which, such property cannot be demanded by its owner; *droit de retention*. In which acceptation of the word, the property is supposed to be in the possession of the creditor, holding it from the debtor, until the lien shall be discharged. In this sense, it is evident it was not intended to be used by our legislature, as the property to be affected is supposed to be in the possession of the debtor.

The lien of the vendor of land for the purchase-money, is well known to the common law; *Sugden's law of vendors*, c. xii. 7 *Wilson's Bac. Abridg.* 147. And has the same effect as our legal or tacit mortgage, so far, as regards the land sold; and corresponds precisely, with one of the legal or tacit mortgages specified in our *Civil Code*, 457, *art.* 23.

That the privilege of the vendor of real estate may properly be termed a lien, is apparent from the interpretation given to the term in the common law books. "*Lien*, is a word used in the law, of two significations; personal

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lien, such as bond, covenant or contract; and real lien, as judgment, statute, recognisance, which oblige and affect the land. *Terms de Ley*"—*Jacob's law Dictionary, verbo Lien.* Such liens as these then, "which proceed from the law without any express covenant of the parties; but which is, notwithstanding, grounded on a tacit consent, which the law presumes to have been given by him, on whose property it grants this mortgage" (*Civ. Code*, 454, *art.* 15) or lien, were contemplated to be embraced by our legislature under the expressions, "all liens of any nature whatever, having the effect of a legal mortgage." Two cases, in which the vendors of real estate hold this mortgage, have been adduced by me; one from the *Civ. Code*, 457, *art.* 23, that of co-heirs; and one from the Spanish law, 1 *Sala*, 385, that of a minor, for the purchase-money of his real estate when sold.

From this view of the subject, I think it appears evident, that the legislature intended to make it imperative, on the vendor of real estate, to record the act which creates his privilege or lien, to render it valid against third persons.

A docket for the purpose of recording "*acts*

of sale, donations, judgments, *or other titles of mortgages*" has always been kept by the register of mortgages, both under the Spanish and American governments. See *Civil Code*, 467, *art.* 62. *Novisima Recopilacion*, *l.* 10, *tit.* 16, *Ll.* 1–3. And under both governments it was required that *creditors*, *who have a privilege* or a mortgage on immoveable property, should register their *titles* in the cases, and in the manner directed by law, in order to pursue their claim against the property in the hands of third persons. *Civil Code*, 460, *art.* 41. *Nov. Recopilacion*, *ibid.* All prudent and diligent persons, enregistered with the recorder the titles which gave them a privilege or a mortgage; particularly the vendors of real estate, as we may safely infer from the fact, that no such controversy as the present has heretofore arisen before our courts.

The interpretation which I have given to our statutes, in the above view of the vendor's privilege, brings back our jurisprudence to the same principles that existed under the Spanish law; which, in my opinion, should be considered as a corroborant argument, in favour of the intentions that I have maintained the legislature had in enacting the insti-

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tutes of 1810 and 1813. As a general principle of the Spanish law, the vendor of real estate held *no lien* or *privilege* on it, when sold on credit, except where a mortgage was expressly reserved and duly recorded.

"*Si al fiado fue vendida la cosa, no se tiene en ella ni en su precio la prelacion del dominio por la deuda de su precio, despues de la tradicion, ó posesion, por transferirse por ella el dominio en el comprador, y mediante el derecho en sus acreedores, segun una ley de Partida, y unos textos del derecho civil, y lo tienen Bartulo, Baldo, Angelo, y Alexandro, y comunmente los Doctores. Y en duda, entregandose la cosa vendida al comprador, es visto haber fé de precio, ó ser al fiado, sino es que el vendedor pensase que luego se le habia de pagar, como lo dice Gregorio Lopez.*" *Curia Philipica*, 415, *Prelacion*, *n.* 8.—"If any thing has been sold on credit, the vendor has no privilege on it for the purchase-money, after a delivery of the possession; because thereby the dominion over the thing was transferred to the purchaser, and by law to his creditors; according to a law of the Partidas; several texts of the Roman civil law; the opinions of Bartulus, Baldus, Angelus, Alexander, and generally of the learned. The delivery of possession, in a doubtful case,

would be considered as proof of a sale on credit, unless it was understood that payment was to be made immediately." See *Part.* 3, 28, 46.* *Febrero, part* 2, *l.* 3, *c.* 3, § 2, *n.* 186, 7. *Salgado, in Labyrinth. Credit. part* 1, *c.* 14, *n.* 78. *Nov. Recop. l.* 10, 16, 1–3. *Pothier, Contrat de Vente, n.* 318, 322, 3.

How far the counsel of the plaintiffs is supported, in considering the privilege of the vendor of real estate of the most sacred character, may be easily inferred, after a consideration of the above cited authorities. No such privilege, as he contends for, was known to the laws of Spain or Rome; and if this novel privilege was introduced into our jurisprudence by the *Civil Code*, it was repealed by the statutes of 1810 and 1813. No one instance of enforcing such a privilege, can be produced from the records of our courts, and I trust there never will be.

I have disposed of the principal obstacle raised against the validity of Morrison's mort-

* This law has been considered as now in force by the two gentlemen, appointed by the legislature, to translate such parts of the Partidas as are law. I am happy to find my argument supported by their unbiassed judgment. Should the opinion of the court coincide with us, the controversy which has arisen in this cause, may be easily decided.

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gage. I will now briefly answer the minor objections, which have been made to it.

It is said, that no mortgage is expressly stipulated in the act of writing made between the parties; and that the sum for which the mortgage is supposed to be made, is not certain and explicit. From the proof, in the statement of facts which comes up with the record, it is shown that apt and legal words are used in the instrument for constituting a mortgage, agreeably to the manner of forming such contract in the state where it was made. The intentions of the parties is very manifest from the words which they have used: and they were no more bound to use any technical expressions and phrases, than they were to confine themselves to a particular language. The words of the English language, which the parties have used, admit of no doubt in the mind of any one acquainted with it, as to the meaning of the contract which they intended to form. Equally clear is the writing, in showing that a sum certain and explicit, was agreed upon as to the amount of the mortgage; which was stipulated to secure the payment of a promissory note of $15,000, given by Smith to Morrison, for which, when paid, Morrison was

to account for, in the manner stated in the contract.

In short, the contract is precisely such an one as has been recognised as valid by the decisions of this court; *Bacon* vs. *Phelan*, 4 *Mart.* 88. *Le Fevre* vs. *Boniquet's Syndics*, 5 *Mart.* 481: it was recorded before any other mortgage in the office of the parish judge, of the parish where the land is situated; and therefore, it should be paid, in priority to every other claim, out of the proceeds of the plantation of the insolvent.

Hawkins, for the claimant Morrison. On the 8th day of October, 1816, Trudeau conveyed to John Kelty Smith, the land and slaves, the proceeds of the sale of which, is involved in the present controversy.

The deed of sale was executed before the judge of the parish of St. James, the land and slaves sold and conveyed being situate in the parish of St. Charles.

The deed, from Trudeau to Smith, was not recorded in the parish where the property is situate until the 17th March, 1821, several years after its execution, and not then le-

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gally admitted to record, wanting the order of the judge for that purpose.

Upon examining this act of sale, it is found in the usual form, vesting complete title in the vendee Smith; and stipulating (as is uniformly done in Louisiana, where it is contemplated to give a lien on the property sold) on the face of the same deed, a mortgage on the estate in favour of the vendor Trudeau.

The purchase-money agreed to be paid by Smith, was $125,000, 25,000 in cash, and the residue in annual instalments of 25,000 dollars.

Two instalments ($50,000) were paid by Smith. In the month of March, 1821, Smith became insolvent, and failed to pay two of the remaining instalments.

After Smith's insolvency, but before the last instalment became due, Trudeau obtained an order of seizure and sale, under his mortgage stipulated in the deed to Smith; and at the sale, caused at his own instance, Trudeau became the purchaser at the price of $80,000, of the same plantation and same slaves, which he had sold Smith for $125,000.

Trudeau has refused to pay over any portion of the purchase-money, claiming to re-

tain the same in his hands, to the exclusion of all other creditors, upon the ground of his *privilege as vendor.*

James Morrison, one of the creditors of John K. Smith, has interposed a claim for $15,000, and interest for several years; and which he claims to be paid (out of the proceeds of the sale of Smith's plantation, so purchased by Trudeau,) as a creditor of the first rank. His claim is based on a *conventional mortgage* and judgment, relative to which the record exhibits the following facts.

More than two years previous to Smith's failure, Morrison having obtained a judgment against him in the state of Kentucky for upwards of $45,000, with the view to secure the payment of $15,000 of this judgment, Smith, on the 23d June, 1819, executed to Morrison the conventional mortgage made part of the record.

On the 15th May, 1820, Morrison's mortgage was duly recorded by order of the district judge in the parish of St. Charles, where the mortgage property is situate, it being on the same plantation and slaves sold by Trudeau to Smith.

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Morrison also prosecuted his claim on this mortgage to judgment, against the syndic of the estate of John K. Smith, in New-Orleans. His mortgage was also recorded in the mortgage-office at New-Orleans, prior to its being recorded in the parish where the property is situate.

At the date of the mortgage executed by Smith to Morrison, the latter had obtained the judgment for $45,000, and which judgment was afterwards confirmed by the supreme court of the state of Kentucky, as appears by the decree of that tribunal, also made part of the record before this court.

At the date of the sale of Smith's plantation, when Trudeau became the purchaser, Morrison's was the only mortgage recorded in the parish where the property was situate, and was so certified by the recorder of mortgages for that parish.

Shall Trudeau retain the whole purchase-money bid by him for Smith's plantation and slaves, upon the ground of his *privilege as vendor?* Or, shall he be decreed to pay Morrison $15,000, with interest and costs, upon the ground that Morrison's conventional mort-

gage, recorded in the manner pointed out by law, secures priority of payment?

Pursuing the order marked out by the opposing counsel, I will examine, first, the nature of the vendor's privilege upon the real estate and slaves; and then the validity of the conventional mortgage relied on to support the claim of Morrison.

I. As to the nature and effect of the vendor's privilege. In Louisiana, as far back as precedent furnishes a guide, it has been customary where the vendor was disposed to retain a *lien* on the estate sold, in the same instrument, by which he passes the title, to stipulate a *mortgage* for the purchase-money remaining unpaid. This mode of proceeding is peculiar to ourselves. For in our sister states, the usage has been, first to pass by one instrument, title to the vendee; and then by a separated deed, executed by the vendee, mortgage and hypothecate the estate to the vendor.

The deed from Trudeau to Smith is such as was usual, and contains alike the clauses of *sale*, *enfeoffment* and *warranty* of title, vesting it fully and to every legal intent in Smith. Nor do the subsequent clauses of hypothecation in the same deed at all weaken

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the validity of the the title vested in Smith. Accompanied, as it was, by delivery, it was as perfect as our laws could make it.

In treating of the property in the thing sold, it is declared, "If a man deliver a thing into the possession of one to whom he had sold it, and the buyer had not paid the price, nor given any security, or pledge, nor stipulated any term for payment, the property in the thing sold will not pass to the buyer, until he had *paid* the *price* therefor. But if he had given any *security* or *pledge* for the payment of the *price*—or had *stipulated* a *term* therefor, or if the seller had *trusted* to him for the payment of it—then the property in the thing will pass by *delivery*, notwithstanding the price *has not been paid*, and the purchaser will remain bound to pay for it thereafter."—*Partida*, 3, *tit.* 28, *l.* 46, *Moreau and Carlton's translation.*

Thus we find our laws recognising, in its fullest extent, the validity of the title passed from Trudeau to Smith.

If this law be sound, then Smith had the right to mortgage, sell, or dispose of this estate to third persons in any manner he thought proper. And the title by which he acquired this estate, is just such as are in daily use,

with which our citizens are most familiar, and the nature and effects of which they most distinctly comprehend.

No right or title can be vested in real estate or slaves, but by writing. *Civil Code*, 310, *art.* 241. No mortgage, verbally stipulated, is good, nor can one be created but by writing. *Civil Code*, 452, *art.* 5. These laws were known and familiar to the proprietors of estates, at the date of Trudeau's sale to Smith. They seem to have recognised the force of these principles, and hence, you find their deed of sale drawn in the usual form, vesting title in Smith, and "*hypothecating* and *mortgaging*" the estate sold for the purchase-money.

All these, however, say the able counsel of Trudeau, were acts of supererogation; that the hypothecary clauses, by which Trudeau obtained a *mortgage*, were nullities; and that neither the contracting parties, nor the judge drawing the notarial act, understood their *rights*, or their *duties*—nor did the vendor need the clauses of *mortgage* in his deed to Smith.

It is not surprising that this ground is taken, for, only let this deed from Trudeau to Smith be deemed, what the parties knew and stipu-

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lated it was, a *deed* of conveyance, with *mortgage* upon the estate sold, to secure the purchase-money, and there is no longer any ground for controversy. For the counsel for Trudeau has had the candour to admit, that, if their deed be a *mortgage*, as relates to the vendor, his rights are gone; for he has failed to place his mortgage on the records of the parish, necessary to its validity, as regards third persons.

But let us deem the stipulations of *mortgage* in this deed, as mere surplusage; and then test it by the principles of law already quoted, will it support the doctrine of privilege contended for by Trudeau's counsel?

It has been already shown, by authority from the *Partida*, if the purchaser give any *security* or *pledge* for the payment of the price, or *stipulate* a *term* therefor, or if the seller *trust* for the payment, then the *property* in the thing *passes* by *delivery*, notwithstanding the *price* has *not been paid.* Suppose the deed from Trudeau to Smith was an ordinary deed of conveyance, without stipulations of mortgage, and stating, "that for and in consideration of $125,000, secured to the vendor by the six promissory notes of the vendee, payable in

yearly instalments; would the vendor still have retained his lien, by way of privilege, against subsequent purchasers or mortgagees?

If this doctrine were to prevail, it not only prostrates the authority of the *Partida*, but involves an absurdity, in requiring of purchasers of property impossibilities.

To whom must subsequent purchasers look for information, as to whether the purchase-money, for an estate sold on credit, has been paid?

He can look alone to the possessor of the estate with whom he contracts; and if he be a corrupt man, by exhibiting feigned vouchers of payment, or collusion with *his vendor*, he may receive the full value of an estate from an innocent third purchaser, and then wrest the property from him, upon the ground that the original purchase-money had not been paid *the prior possessor* and *vendor*.

It was to prevent frauds like these, that our legislature have required, all liens to be recorded where the property is situate.

How often is it the case, that the original vendors of property, sold on credit, reside in foreign countries. Adopt the principles contended for by the opposite counsel, and no

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man would be safe in purchasing property, once sold on credit, until he had pursued all former vendors, whatever be their distance or place of abode, to ascertain if they had been paid the purchase-money, stipulated for. It was to obviate evils like this, that our legislature have declared, that all liens, not recorded in due time where the property is situate, shall be void as to third persons.

Let us follow the opposite counsel back to the *Civil Code*, and it is not believed, he has there found for his client, a shelter free from difficulty, or one entirely satisfactory to his own vigilant and discriminating mind. He protests against the deed, of his client to Smith, having secured the benefit of a

1st. Conventional mortgage.

It is not pretended that it is a

2d. Judicial mortgage.

Nor will he permit it to be considered a

3d. Legal or tacit mortgage.

Our *Code* proceeds, under another view, to the divisions of *simple mortgage* and *privilege mortgage*, *general mortgage* and *special mortgage*; and the opposite counsel is equally unwilling to permit his clients' stipulations of mortgage in the deed to Smith, to give it the character

of either simple mortgage, privilege mortgage, special mortgage, or general mortgage.

For, although in one part of the argument he seems to consider the *privilege of the vendor*, and *privilege mortgage* as convertible, and they are, by the *Civil Code*, made one and the same thing; yet finally, he takes the only position which even furnishes argument, and declares, "*we contend that we have a privilege. Our lien on the land is prior to all mortgages, whatever be their date.*"

It was found necessary to take from this instrument (and this too in despite of its covenants) every feature which would give it the character of even a *privileged mortgage*; notwithstanding the *Code* (*p.* 456, *art.* 29,) says "the *privileged mortgage*, or as it is otherwise called, the *privilege*, is that which derives from a *privileged cause*, which gives a preference over the creditors who have only a simple mortgage, though of a prior date.

"Such is the privilege of the vendor, who has the preference over every other creditor, for his payment, on the real property he has sold."

Were we confined, in our views of this subject, to the *Civil Code* alone, it would be difficult to discover the ground of this solicitude

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to take from the writing, on which the plaintiff relies to support his claim, even the character of a *privileged mortgage.* But the difficulty is removed, the moment we turn our attention to the statute of 1810, passed two years after the adoption of the *Code*, where it is declared—

"*No iustrument, stipulating a mortgage*, shall have *any effect against third persons*, except from the *day* on which the same shall have been *recorded* in the office of the judge of the parish, where the hypothecated property is situated." 3 *Martin's Dig.* 138, § 4.

It has not been contended, that the *privilege of the vendor* cannot be *stipulated* in the act of sale. On the contrary, the counsel for the plaintiff has acknowledged that, "*It is a privilege which must appear manifest on the act of sale itself. If the seller acknowledge, in the act, that he has received the price in the presence of the notary, or out of it, with the proper renunciation of the exception of* non numeratæ pecuniæ *then there is an end of the vendor's privilege.*"

Let us strike out of the deed from Trudeau to Smith, all the stipulations of mortgage and hypothecation, or rather, to meet the views of the opposite counsel, let them be convert-

ed into mere *stipulations* of the vendor's *privilege*—the *privilege* of the vendor being declared by the *Civil Code* to be nothing more nor less than the *privilege mortgage;* and the subsequent statute (1810) having declared, that *no instrument* stipulating a *mortgage* shall have *any effect* against third persons, except from the day on which the same shall have been *recorded* in the office of the judge of the the parish where the hypothecated property is situated, it appears to my mind, that the counsel for Trudeau has but one possible alternative to escape the imperitive operation of this statute—and that is, by proving to the court, that a *privileged mortgage* is *no mortgage at all.*

We have shown by the provisions of our *Code*, that title to land and slaves cannot pass without *writing*—that no mortgage can be created but by *writing*—that the privilege of the *vendor* is nothing more nor less than the *privilege mortgage.*

Our adversary has shown, that the privilege of the vendor must be expressly *stipulated* on the face of the deed, or there is an end of the privilege. To stipulate it, gives it at once the character of a *privilege mortgage*, and then

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the statute of 1810 embraces all *instruments stipulating* a *mortgage.*

It is in vain to say, that the legislature did not contemplate including the vendor's privilege, because the *Civil Code* was then before them, and they saw that this privilege was, in fact, the *privilege mortgage;* and it was one of the cases contemplated, and expressly embraced, by that act.

If any doubt remained, it would be removed by a subsequent section of the same statute, which declares, "No *notarial act*, concerning *immoveable property*, shall have any effect against *third persons*, until the same shall have been *recorded* in the office of the judge of the parish where the immoveable property is situated." 3 *Martin's Dig.* 140, § 7.

This little section imposes on the counsel of the plaintiff, not only the task of establishing the deed from Trudeau to Smith to contain no stipulations of *mortgage*, but he must also show, that it is not a *notarial act*, and that it does not concern *immoveable* property.

Upon this subject our legislative body were influenced by the dictates of common sense, and have exercised that soundness of judgment calculated to put down all

controversy, and to remove all doubt as regarded the recording of instruments affecting real estate. They saw the *Civil Code* crowded with privileges of various kinds—they saw too, perhaps, what the opposite counsel acknowledges to have existed, some confusion in the *Civil Code*, as to the several mortgages; and, after first speaking of all instruments stipulating a mortgage, they then engraft a section, declaring, "that no notarial act *concerning* immoveable property," &c. The word "concerning," here employed by the legislature, gained in comprehensiveness, though it lost in technicality; evidently intending, and actually embracing every description of writing which could, in any wise, affect real estate.

Were it not for the *seeming* importance which the plaintiffs have managed to give this cause, the counsel for Morrison might be permitted to rest the argument here, relying upon the positive provisions of a statute for protection of his rights. We are told, however, that this statute does not embrace *instruments* stipulating a *lien* or *privilege* in favour of the vendor.

This view of the subject might well have been anticipated, for nothing is more natural

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to counsel, in a bad cause, than to *meet* the force of authority, by protesting against its applicability.

Let us see if the interests of our client will not find additional protection, from a second statute.

The value of all laws and systems, can alone be tested by their application to the practical operations of society.

However admirable our system, as regards *mortgages* and *privileges*, it was not only competent, but the duty of the legislative body, to prescribe the performance of certain duties to those claiming the benefit of *either*. They have done so; and in the construction of these statutes, we need only resort to the well established rules of interpretation, and inquire—What was the *evil* contemplated to be *remedied?* What was the new *duty* required to be *performed?*

Prior to the statute of 1810, the evil was, the door opened to fraud in keeping secreted from public inspection liens on real estate and slaves. Without altering the nature of the lien—without taking from it, its *full force* as between the *contracting parties*, the legislature simply imposed the duty of causing the

intsrument stipulating the lien to be recorded where the property was situated, to give it any validity as regards *third persons*: and they supposed, at the moment, they had gone far enough. But between the year 1810 and year 1813, new difficulties arose—new evils presented themselves. It was, in fact, only about that period that the abstract principles of the *Civil Code*, began to be tested by experience, and the adjudications of the supreme court.

What were the evils which the legislature of 1813 was called on to remedy? They arose in permitting a long list of liens, arising from legal or tacit *motgages* and *privileges*, (having their existence only in the private *contracts of the parties*, and the discharge of *duties* in the *administration* of estates, &c.) to operate upon property, to the prejudice of *third persons*, who had no knowledge of the existence of these *liens*.

No unbiassed mind can read this latter statute without, at once, coming to the conclusion, that the legislature contemplated to embrace, and, in fact, has embraced, every possible case in which real estate and slaves

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can be affected by *liens* of any description whatever.

They first begin with a special enumeration of cases, and say—

1*st. All securities to be furnished by tutors.*

2*d. Administrators of estates,*

3*d. Curators,*

4*th. Executors,*

5*th. Guardians,*

6*th. Officers of the government,*

7*th. By persons employed in public service,*

8*th. All sales of slaves or lands by sheriffs,*

9*th. All marriage contracts,*

10*th. All final judgments,*

11*th. All awards confirmed by judgment,*

12*th. All marriage contracts made out of the state, where the parties move here to reside,* "*shall be recorded,*" &*c.*

Where lands or slaves are affected, the recording to be in the "*parish where they are situated.*"

"And all sureties, sales, contracts, judgments, sentences or decrees aforesaid, and all *liens of any nature whatever*, having the effect of a legal mortgage, which shall not be recorded agreeably to the provisions of this act, shall be utterly null and void, to all in-

tents and purposes, *except between the parties thereto.*" 3 *Mart. Dig.* 700.

We are told, however, that this statute is a mere nullity—that it has no application—that the *liens* embraced by it, are liens having the *effect* of a *legal mortgage*, and that the plaintiffs' is no legal mortgage, but purely a *privilege.* And by way of *repealing* authority, we are carried back five years, to the following article in the *Civil Code:*—

"*Privileges* on moveables as well as immoveables, and *legal mortgages*, have their effect even against third persons, without any necessity of being recorded." *Code*, 464, *art.* 54.

There is but one way in which the plaintiffs' counsel can avoid the force of this statute, and that is, by establishing to the satisfaction of the court, that his *privilege* is no *lien;* for if his privilege be a lien, then, to use his own forcible language, the "rights of the vendor are gone."

It is not a very pleasant task to pursue a discussion into the mazes of technical refinement, but it must in this case be done, if from no other consideration, than that of respect to the talents so gravely employed in leading on the discussion.

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There is a distinction between *liens* and *privileges*. All liens cannot be reduced to the head of privilege. But it is difficult to conceive of a privilege affecting real estate, that would not be considered a lien. Few words are employed, even by lawyers, so comprehensive in their nature, as that of *lien*. "It is a word used in *law* of two significations; personal lien, such as bond, covenant, or contract; and *real lien*, a judgment, statute, or recognisance, which affect the land." *Terms de ley.*

It signifies an *obligation*, *tie* or *claim*, annexed to, or *attaching upon* any property. *Jacob's Law Dict. tit. Lien.*

A lien then is produced by *bond*, *covenant* or *contract*, by *judgment*, *statute* or *recognisance*.

The costs of an attorney are a *lien* upon the deeds or papers in his hands, (and their liens naturally present themselves as the *first* in order.) The factor has a lien upon the goods in his hands, for any balance due him from his principal. The common carrier has a lien for his charges. In Louisiana, parish judges have a lien upon the estate in their hands, for all fees, charges, &c. It would occupy unnecessary time to enumerate all ou

specific liens. The whole list of mortgages and privileges, known to our law, are considered liens, and so treated in the *Code.*

In the very definition of mortgage, (*Code*, 452, *art.* 2,) they are spoken of as producing a *lien* on the things subjected to their operation.

That privileges are considered liens, the opposite counsel has relieved us from the necessity of supporting by any other than his own authority; for he has told us, in the commencement of his argument, "The right of the seller of immoveable property, to his *lien* upon it for the price unpaid, can hardly be taken away or impaired, without violating the principle of property itself."

And again, in the same page, he repeats, "The vendor's *privilege*, on the thing sold, is not one of those *liens* which requires to be recorded in order to be preserved."

Still keeping in view the true character of his privilege, he adds, "Our *lien*, on the one hand, is prior to all mortgages, whatever might be their date."

Had the learned counsel been a member of the legislative body, in the year 1813, he would, no doubt, have been called on to pen

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the statute before us; and unless the views he now takes of the nature of *privilege* and *lien* be altogether unsound, he would have employed the very language of the statute. And upon reviewing and scrutinizing his labour, he would have had abundant cause of self gratulation in the comprehensiveness of the terms employed; for he would have found no *lien* could escape their operation; no, not even a *privileged lien.*

But, we are again met by another argument, in which we are told, that the privilege of the vendor is not embraced in this statute; because, after the words "and all liens of any nature whatever," the legislature have added the words "*having the effect of a legal mortgage.*"

Now, although we have not urged that the *privilege* of the vendor is a *legal mortgage*, I think we may with great propriety urge, that the privilege of the vendor, is one of *those liens*, having the "*effect of a legal mortgage.*"

The *Civil Code*, *art.* 54, *p.* 464, before referred to, declares them to have precisely the same effect; which is, "that both privileges and legal mortgages have their *effect* against third persons, without being recorded."

The opposite counsel will not complain of this argument, because, if his lien has not the effect of a legal mortgage, it is not worth a straw. But we are urged to press the argument much farther, and to come to the conclusion, that because the legislature speak of "All liens, of any nature whatever, having the effect of a legal mortgage" they therefore mean, none but liens given by *legal mortgages;* and the plaintiffs' not being a *lien* by legal mortgage, but purely a *lien* by privilege; consequently, his lien is not embraced in the terms "all liens of any nature whatever."

I leave my adversary in the full enjoyment of the benefits likely to flow from such premises, and such conclusions.

We do not presume too much when we say, our client's rights find full protection in the letter, as well as the spirit of the laws, to which we have adverted.

The reason and policy of the law, and justice of the case, is also with us. No difficulty or confusion, could have arisen under the provisions of our *Civil Code*, but for the introduction of the 54th *art.* before referred to, giving effect to privileges and legal mort-

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gages against third persons, without requiring them to be recorded.

It was a provision, which found its way into the *Code* without reflection as to its consequences, and evidently in contravention of several previous provisions. My colleague must have satisfied the court, that it was too, in derogation of the laws which existed previous to the adoption of the *Code.*

In examining the provisions of the *Code,* as to the registry of mortgages, and several others, it was clearly the object of its framers, to require the recording of both privileges and mortgages, to affect the rights of third persons.

I need only cite a single article under the head "of the effects of mortgages against the third possessor," where it is declared, "That creditors, who have either a *privilege* or *mortgage* on immoveable property, or on slaves, may pursue their claim on them into whatever hands they may happen to pass, to be paid out of the proceeds in the order of collocation, agreeably to their *privileges* or *mortgages,* provided their titles have been *registered* in the cases and manner directed by law. *Code, p.* 460, *art.* 41.

Is not this duty of recording, so as to affect the rights of third persons, founded on the soundest policy? Has it not received the sanction of all states with whose jurisprudence we are conversant?

As to the evils arising from the doctrine for which we contend, there are none. The case now before the court is, perhaps, the only one that will arise; for, if any one has been so improvident as not to discharge a duty, so plainly pointed out by more than one statute, he has abundant security in now having his mortgages and liens *recorded where* the law directs. The importance of this case, therefore, is made to grow out of the wealth and influence of the family with whom we have to contend; and never had a litigant so little cause of complaint.

He sold a plantation to Smith for $125,000 —received fifty thousand dollars. In all probability, a considerable portion of the $45,000, advanced Smith by Morrison, was paid to Trudeau. When his subsequent instalments became due, that is, two of them, he seizes the estate; and under his own order of seizure and sale, becomes the purchaser—gets back

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the same plantation and slaves for the balance of purchase money due him—and pockets $50,000, clear gain from Smith—a sum, sufficient in itself, to cause his bankruptcy; leaving Smith's other creditors without a cent. And yet, the sympathies of the court have been appealed to, on account of the hardness of the plaintiffs' case. The court is earnestly urged to violate the provisions of two statutes; and to do so, by giving an interpretation to the stipulations of mortgage, in the face of the deed to Smith, in direct opposition to the evident meaning of the parties.

If this instrument is no mortgage, how was it that Trudeau was so ready to seize and sell the estate, under the laws made for the benefit of mortgagees? It was a very good mortgage when he desired to sell the estate; and a still better one when it enabled him, by the amount of his own claim, to put down all opposition in bidding, and obtain the estate for the balance due him. But it becomes no mortgage at all, when he is asked to pay Morrison's debt, secured by mortgage; and that mortgage duly recorded, certified, and made known to Trudeau at the day of sale.

But I do not impeach the sale. We only ask what the law will award; and that is, payment out of the proceeds of sale. Under what circumstances do we ask it?

Morrison finds Smith enjoying a large sugar estate; and he had then enjoyed it upwards of two years after the sale to him by Trudeau. Smith assures him that the estate is free from incumbrance. In fact, he stipulates on the face of the mortgage to Morrison, that the estate is free from all incumbrances whatever. Morrison receives the deed, forwards it to his agent at New-Orleans, who, upon examination in the general mortgage office of this city, finds no lien or mortgage on the estate, as Smith had covenanted; and there causes Morrison's mortgage to be recorded.

Finding, however, the law requiring his mortgage to be recorded in the parish where the land and negroes were, to make it valid as regards third persons, the records are there examined; no mortgage or lien in favour of Trudeau or any one else, is found; under a second order of a judge, Morrison's mortgage is again recorded; and he is now before this court, seeking only about one-fourth of the amount due him by Smith,

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with no hope of ever obtaining a dollar should his claim be rejected.

I will say nothing as to the hardship of the case. Let it speak for itself. I will not weaken the force of the appeal.

Our attention has been called to the provision of the *Code* which declares:—

"They who have on the property which may be *duly mortgaged*, only a right either depending on a condition, or subject to be annulled or rescinded in certain cases, can only consent to a mortgage subject to the same conditions, or to the same rescission." *Code*, 452, *art.* 7.

If this principle be applicable to the covenants, creating a mortgage in Trudeau's deed, we have at hand a conclusive answer.

The law, for wise and good purposes, has declared, that if you sell your estate, and retain *liens* on it by conditions in your deed of sale, you shall give notice to the community, of the *conditions* on which you have sold your estate, by spreading your deeds on the records of the parish where your property lies. In other words, that you shall not be accessory to gross frauds, by giving an apparent wealth to your *vendee*, in the possession and enjoy-

ment of a large estate, and by which, at some distant day, you are, through the agency of *secret liens and conditions*, to ruin innocent and *bona fide* third purchasers. The very object of the law in requiring the recording of liens affecting real estates was, that subsequent purchasers and third persons might, by looking at the public offices of record, there see the *conditions* on which estates are held; and then the force of the principle, from the *Code* just cited, would have its full effect. The article to which our attention is called, speaks too of "property which may be *duly mortgaged*," and no property can be duly mortgaged as regards *third persons*, without being *duly recorded*.

Our adversary attaches a much more sacred character to his privilege, than the *Code* from whence he draws the doctrines that govern it. He speaks of it as being blended with the very principle of property itself.

We find several instances, where the privilege of the vendor is lost, even though the property remain in the hands of the vendee.

"When for want of moveables, the creditors who have a privilege (on real estate) demand to be paid out of the proceeds of the immoveables, in concurrence with the credi-

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tors who also have a privilege on said immoveables, the payments must be made in the following order:—1st. *funeral charges;* 2d. *law charges;* 3d. *charges* respecting *medical* attendance, *physician*, *druggist*, &c.; 4th. the *salaries* of the persons who lent their services during the last year, or what is due on the current year; 5th. the *price of the subsistence* furnished to a *debtor*, and to his *family*, during the last *six months*, by traders in retail, as *bakers*, *butchers*, and the *like;* and during the last *year* by *tavern* keepers and *boarding houses.*" *Code*, 468, *art.* 73, 470, *art.* 77.

And then comes the privileges of the creditors, mentioned in the 75th *art.* of the *Code*, same *page*—to wit, the *privilege* of the *vendor.*

Here you find a long list of claims, in some cases sufficient to exhaust the whole proceeds of sale of a plantation of inconsiderable value, actually preferred and paid, prior to the vendor of the same estate.

And why is this done? For the reason already urged, that the possession of the estate gives those who hold it a credit with society, which the law will not permit to be abused.

In treating of donations it is declared that,

"where there is a donation of property susceptible of *mortgage*, a transcript of the act containing the donation, must be made within the time directed for the transcript of mortgages, in a separate folio book, &c.

"The want of transcription, may be pleaded by all persons concerned; except those who were charged to cause the transcription, or their assigns, and the donor." *Code*, 222, *art.* 62–64.

In treating of the duties imposed on beneficiary heirs, who claim with the benefit of inventory, the law provides, that after the usual advertisements, if the heir pay even ordinary creditors, and there be an insufficiency of funds, *privileged* or *mortgaged* creditors, who have not presented their claims, lose the benefit of their liens; even though on the very estate sold, and out of which ordinary creditors have been paid. *Code*, *p.* 170, *art.* 113.

And why is this inroad made upon what our adversary would deem, the sacredness of his privilege? Simply because the law requires, that he who claims by privilege, should within a given time exhibit his lien, and cause it to be enforced, or let other creditors controvert

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its legality; and having failed to do so, the law deems it a nullity. Is this law less binding? Is its reason, or the policy on which it is founded, less forcible, than the positive and repeated provisions of our statutes, requiring the recording of all notarial acts, mortgages, and liens affecting real estate, to give them validity against third persons?

By adverting to the decisions of our supreme court, they will be found to sustain the principles for which we contend.

The first, is that of *Lafon* vs. *Sadler*, 4. *Mart. p.* 476. There the lien supported was that of privilege, resting purely on the rights of the plaintiff as a builder. His lien was not created by writing. No writing was, in fact, necessary. The law created the lien when the work was performed; and the court very properly decide, that expressing the terms of the contract in writing, or by notarial act, could not strengthen the privilege which already existed. But the chain of reasoning evidently shows, that if the lien in that case (as in this) had been created by *writing*, and that not recorded as directed by law, the lien would have been void, as to third persons.

This case was decided by the court in

June, 1816. In the ensuing session we find that body again employed on this subject; and their principal object was to remedy the evil growing out of liens secured to builders of houses, ships, &c.; and they require, "That in all claims exceeding $500, no architect, undertaker, or other workman, shall enjoy with regard to a *third party*, any privilege or legal mortgage, on any immoveable property, ship, vessel, or watercraft, on account of any work, furniture, building or repairs; unless they shall have entered into a written contract, and which shall be recorded by the recorder of mortgages, parish judge," &c. *Sess. Acts*, 1817, 122, § 7.

Thus we find the legislature, from time to time, legislating with the express view of closing the door against the evils of which we complain.

If it was sound policy to give the world notice of liens on buildings and ships, where the sum demanded only amounted to $500, by causing the lien to be recorded; how much stronger the reason for requiring the vendor to record his lien, where it is not unusual to give long credits, and where estates are

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frequently sold for sums amounting to princely fortunes?

They have so legislated, and by as many as three distinct statutory provisions, all made in relation to real estate and slaves; and passed since the adoption of the *Code.*

The section of the *act* of 1817, just referred to, shows most conclusively also, the intention of the legislature when speaking of *legal mortgages* and *privileges.*

They were evidently deemed one and the same, and hence the use of the words, "No architect, undertaker or other workman, shall enjoy with regard to a third party, any *privilege* or *legal mortgage* on any immoveable property without recording," &c.

The case of *Millaudon* vs. *New-Orleans Water Company*, (11 *Martin's Rep.* 278,) comes next in order. There the privilege was claimed on a moveable, to wit, an engine, and enforced upon a provision of the *Code*, in regard to moveables, but in no wise whatever affecting the case now before the court.

The next case is that of *Jenkin's* vs. *Wilson's Syndics*, where the court are called on to decide the rights of the builder claiming a privilege

Not a *non-recorded* privilege; for the contract upon which his lien was founded had been recorded; and that too, by order of a judge. But the omission was, that it had not been recorded *within ten days.*

I cannot serve my client more essentially, than by using the strong illustration of his rights, furnished by this court in the case just referred to.

"In *Lafon* vs. *Sadler*, 4 *Martin*, 476, (say the court,) we held that the *notarial act* was only the evidence of a fact, from which the plaintiffs' privilege resulted; in the present case, the writing is of the very essence of the appellees."

"Lafon having built Goodwin's house, had *ipso facto*, by law a tacit *lien*, (and here too the supreme court deem *privilege*, just what the opposite counsel does, a *lien*.) His having reduced to writing the contract which fixed the manner in which the house was to be built, and the payment effected, did not *create* his right. Having a *lien* by law, and made a contract which did not modify his right, he was allowed to avail himself of his stronger title, that which resulted from the law.

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"Here the plaintiffs' *lien*," (it is unfortunate for the plaintiff that the court go so often hand in hand with the legislature in the application of *lien*, to what the plaintiffs' counsel must have purely *privilege*, or his client will have nothing) "is not independent from the writing; for the *writing* is the very *essence* of it. Here the writing is essential to the plaintiffs' recovery, and the defendant may resist its introduction, *unless* it *has been recorded according to law*." *Jenkins* vs. *Wilson's Syndics*, 11 *Martin*, 436-7. And the court decreed the writing null, solely upon the ground that it was not recorded *within ten days*. What additional authority does Morrison's case require?

It has been admitted by the opposite counsel, that Trudeau's "*privilege must appear manifest upon the act of sale itself.*" If this be correct, and no rational mind can question it, then it is "*created*" by the *act of sale;* and consequently, in the language of this court, "the plaintiffs' lien is not independent from the writing; for the writing is of the very essence of it."

The lien of the builder was a *privilege*. The lien of the vendor, say the counsel, is a

privilege. The statutes require both to be in *writing*—both to be *recorded.* Shall the failure to record, as the law prescribes, be fatal to one, and yet furnish protection to the other?

The second branch of the subject, the *nature and validity of Morrison's mortgage*, presents itself.

It is a mortgage executed in the state of Kentucky, familiar to the laws of that state; and its execution duly authenticated conformably to the act of congress. *Ingersol's Dig.* 77.

Neither the execution nor authentication of this instrument, however, have been controverted by the opposite counsel; but its effect is attempted to be shaken upon two grounds:

1st. That it is a conditional or defeasible sale and no mortgage.

2d. That it is uncertain as to the sum of money secured.

That it is purely a mortgage, the whole nature of the transaction, as well as the instrument itself, conclusively shows. It is in the usual common law form, except as to conditions of re-entry, grown into disuse by the interposition of courts of equity; furnishing on the one

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hand, the equity of redemption; and on the other, the right of foreclosure by seizure and sale; both, features familiar to the laws of Louisiana. And we shall be aided on this subject by the fact, that there is no essential difference in the principles recognised by courts of equity in our sister states (as regards mortgages) and the courts of this state. The only difference is, that here the mortgagor remains in possession of the property mortgaged, whilst in other states, they not unfrequently surrender the use of the mortgaged property to the mortgagee, and especially when the security given is slender. President Pendleton has told us, that in Virginia, (where the system of jurisprudence is the same with that of Kentucky,) "In recurring to the nature and principles of mortgage, they were borrowed from the *Civil law*," 1 *Wash. Rep.* 19; and for the nature of this mortgage, see *Powel on Mortgages*, and the precedent there given.

There is a strong and marked distinction between a conditional or defeasible sale, and mortgage. In the former, an actual sale must take place; founded upon a consideration paid, (and this consideration must bear some proportion to the value of the estate

sold, to escape the imputation of fraud) coupled with *condition*, that if the money be not repaid on a given day, then the right to become *indefeasible*.

The mortgage, on the other hand, is a deed of conveyance, *for the security of money*, vesting the right and title in the mortgagee, but conditioned to be void upon the faithful payment of the money secured; and if the money be not paid, then the right of foreclosure attaches to the mortgagee, and the equity of redemption to the mortgagor.

In examining instruments of both description, whatever be the peculiar language employed in the contract, the essential and governing rule of interpretation is, *the real object of the contracting parties*. 1 *Call Rep.* 280–7. 2 *Call Rep.* 429. 1 *Hardin's Rep.* 6. And a mortgage has ever been considered in the natureof a "security for money." 1 *Bibb.Rep.* 528. The deed from Smith to Morrison, stipulates a mortgage, and must therefore be considered as a *security for money*.

In adhering to the rule, that the "true intention of the parties should govern such contracts," the courts of sister states, as well as this tribunal, have adjudged deeds of sale

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without condition, and vesting complete title, to take the rank only of mortgage securities, and permitted the introduction of other testimony, to establish the object of the parties. in the execution of the writing. 1 *Wash. Rep. Ross* vs. *Norvell*, 14; *Barron* vs. *Philan.* 4 *Mart.* 88. Is there any thing in Morrison's mortgage bearing the semblance of sale, *defeasible* or *indefeasible?* What, sell a large sugar estate and seventy slaves, purchased by Smith at the price of $125,000, to Morrison for the sum of $15,000!!!

According to the authorities just quoted, if the instrument had not stipulated a mortgage but had purported to convey perfect title, this court would have decreed the title void, in favour of either Smith or his creditors, could it have been established by *other testimony*, that the *positive* sale was only intended as a *security*.

Shall Morrison be in a worse condition by having in good faith obtained, what was contemplated to be given, a mortgage, stipulating the same as a *security* for his debt?

But how is our adversary to be benefitted by making this a defeasible deed?

It will greatly oblige Morrison to have it so

considered; for Smith having failed to pay the $15,000, on the day appointed, the deed lost its defeasible character, and the estate became completely *vested* in Morrison; and, as the opposite counsel insists on it, we pray of this court to decree us the restoration and enjoyment of our property.

As to the second objection, that Morrison's mortgage is not sufficiently certain, the argument is answered by an attentive perusal of the instrument itself.

The express sum secured is "fifteen thousand dollars;" it was not to be enlarged or diminished, nor was the sum secured in any way to depend on subsequent events. The subsequent stipulations in the mortgage, are altogether personal, as to Morrison. The $15,000 was to be paid on a given day; and if not paid, the benefit of a foreclosure, by order of seizure and sale, at once attached to Morrison. No covenant is introduced affecting this sum, or the *lien* given to secure its payment. And that the payment was to be enforced through the lien, if Smith did not pay at the day fixed, is strengthened by the subsequent stipulation, that Morrison was to *refund* any amount received from Smith, should

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the surpreme court of Kentucky decree a less sum than the 15,000 dollars.

How could he refund unless he had first received? And it was to secure the *receipt*, that the mortgage was given.

If any doubt could be entertained on this subject, it is removed by authority from *Bibb's Reports*, as to what constitutes uncertainty in a mortgage; and by the testimony of judge Turner who deposes as to the validity and force of this mortgage, according to the laws where it was made. See 4 *Bibb's Reports*, 283.

Morrison's having obtained his judgment for $45,000 prior to his mortgage, produced certainty as to that sum. Nor was this certainly weakened by the confirmation of this judgment by the supreme court of Kentucky, and this too, prior to the pretended recording of Trudeau's mortgage.

It has, however, been urged to the court that, as regards real estate, our courts will not permit it to be affected in any other, than the manner pointed out by our own laws. Fortunately for our client, it is not at all necessary to controvert this position; the laws of this state, and those of Kentucky where the mortgage was executed, agreeing

in every essential, requisite to the validity and force of this mortgage.

There, mortgages cannot be created but by writing. Such is the law here. Nor can the mortgage have effect against third persons, unless duly executed and recorded as the law directs. Such is the law here. There, the intention of the parties, as to the nature of the instrument, is the governing rule of interpretation; such is the law here.

It will not be seriously contended, that parties, competant to contract, cannot execute a mortgage in a sister state on property in this. This would go to vacate all contracts made out of this state; for, what is this mortgage but a contract?

This court, as also the tribunals of justice throughout the union, are in the daily practice of enforcing contracts made out of the state, where their execution is decreed; and no principle is better established, than that they will be enforced as to their *nature* and *effect*, according to the laws of the state *where made*. 3 *Dallas*, 370. See *Lynch* vs. *Postlewaite*, 7 *Mart.* 70; 1 *Gallison*, 371; 7 *Martin*, 352; 1 *Peter's Rep.* 74; *Morris* vs. *Eve*, 11 *Martin*, 730.

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All that this court, or any other governed by sound principles, can with propriety do, is, to take care that they do not enforce contracts, made *elsewhere*, in violation of the established rights of property, and to the prejudice of society *here*.

It could not be asked of us, for instance, to permit real estate to be affected other than as the laws of our country require. Nor, that we should exempt citizens of other states from the performance of any duty we think proper to prescribe, in order to give their contracts or liens force and validity as to property in Louisiana.

But this court have gone farther, in the case of *Whiston* vs. *Stodder & als. Syndics*, than we ask them to go. They decided in that case, that a lien attaching by the laws of a foreign country would follow property removed into this state, and be enforced here. 8 *Martin's Rep.* 135.

We only ask of the court to give Morrison's mortgage the force and effect that would be given to similar contracts by the laws *where made*, and they are precisely similar to our own. Nor do we rely alone on this principle for protection. Upon presenting Morrison's

lien for enforcement, we take upon ourselves the task of showing, and we have clearly established, 1st, that his lien is created by *writing*, and in the same manner authorized by the laws of this state; and secondly, that he has performed all the duties which our laws require, so as to give his lien full force and effect.

A decision in our favour preserves the sanctity of our laws, violates no principle of property, and in no wise prejudices the established rights of our citizens.

If the plaintiffs' lien has not the preference, to whom does censure attach? Where was the negligence which took away its priority? At his own door, in disobeying the positive injunctions of our own laws as to the duties enjoined, to give his lien validity, as regards third persons.

I will close this argument, on the part of Morrison, by calling the attention of the court to two provisions of our *Code*, which clearly show, our legislative body looked to the enforcement of mortgages from sister states.

In treating of mortgages and the several sorts, it is enacted, that "judgments rendered in the other states or territories of the United States, give a *mortgage* validity only from the

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day, when their execution has been ordered by one of the judges of this territory.

"Conventional and judicial mortgages cannot operate against a third person, except from the day of their being entered in the office of the register of mortgages in the manner and form directed by the *Code*." *Code*, 454, *art.* 12, 14.

Workman, in reply. In the elaborate and ingenious arguments of the learned counsel, on the other side, I find nothing that can overthrow my clients' claim. A written instrument is unquestionably indispensable for the vendor's privilege on immoveable property; for without such an instrument, that species of property cannot be legally sold: but the counsel goes too far when he maintains, that the proof of the existence of the privilege cannot be drawn from any other source. If it appears conclusively from the deed itself, that the price has been fully paid, then indeed there can be no question about the privilege for that price. But if it is shown, that the payment has been made only by notes, then the privilege will exist for the amount of those notes, should they not be paid. This has been determined repeatedly, even in the case of the

less solemn privilege of the vendor of moveable property.

The important question, whether the mortgagee of Smith can be considered as a third party, in the legal sense, is slipped over, by the opposite counsel, very smoothly. He tells us, laconically and confidently, that whoever was not a party to the deed, must be considered under the denomination of a third person. Then the heirs, or the legatees, or the vendees of Smith, as well as his mortgagees, would be third parties: and he who has no title at all, or but an imperfect or conditional one, to an estate, may, nevertheless, transmit that estate by a good title to another. The idea of a *third party* does, *ex vi terminorum*, exclude the principal party, his representatives and *ayants-cause*, that is all those who claim immediately from or through him.

I am not surprised, that the gentleman finds the definition of mortgage in our *Civil Code* to be an unfortunate one. It is so, for his cause at least. From this definition, as the counsel himself understands it, our claim, whatever it may be, cannot be considered as a simple conventional mortgage; for the vendee had no right or property in the estate sold, until

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he accepted of the sale of it. Neither, according to the definition (*C. C.* 454, *art.* 15) can our claim, as it is represented by the adverse party, be a legal mortgage; a legal mortgage being that which proceeds from the law, without any express covenant of the parties—and our claim being expressly covenanted for, and reserved by the parties themselves. What then can our claim be?—a privilege or privileged mortgage, and nothing else.

It is too late now for the parties to object, that we have proceeded on our privileged mortgage, as if it had been an ordinary conventional mortgage. In whatever manner the estate in question might have been sold, whether at our suit, or by the syndics of Smith, we should have been entitled to our privilege on the proceeds. But the counsel expressly state, that they do not wish to set aside the sale that has been made: neither do we.

Of the true meaning of the word *lien*, no doubt can be entertained. If the legislature had enacted, that all liens whatever, not duly recorded, should be null and void, &c. I presume, all privileges like ours would have been included in that enactment. If the legislature intended to do, what it is erroneously said they

have effectually done, they would have ordained, either that all liens whatever,—or all liens having the effect of a legal or privilege mortgage,—not recorded, &c. shall be null and void. But our legislature never did, and never intended to do any such thing. They could not do this without destroying all the privileges given on real property for funeral charges, law charges, charges for medical attendance, for salaries of persons hired, for subsistence, *et cetera*; privileges, most of which it would be impracticable to record in the manner the act prescribes for liens having the effect only of a legal mortgage. The construction, contended for, of the last part of the first section of the act of 1813, cannot be maintained without depriving all those entitled to the privileges above mentioned of their liens on the debtor's immoveable property.—But it is already well settled, that no such effects have been produced by that act. This court has so decided in the cases I have already cited; and the legislature have confirmed the principle of the decisions in those cases, by modifying, in the act of 1817, the law in respect to one particular kind of privilege, to wit, the builder's privilege, when his

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claim should exceed 500 dollars. The act of 1815 required the registry of all liens having the effect of a legal mortgage. The act of 1817 requires the registry of one, and only one species of lien, having the effect of a privilege mortgage. If the legislature, in 1817, intended to require the registry of any other kinds of privileges, or liens having the effect of a privilege mortgage, they would have expressly designated and enumerated them.—This provision for the record of one sort of privilege, or privileged mortgage, on immoveable property, is a decided exclusion of the legal necessity of recording any others. And thus, as one of the counsel very justly observes, we find the legislature, from time to time, legislating with the view of closing the door against the evils of concealed liens: yet at no time, though they have had many years to meditate on the subject, have they legislated in this manner respecting the vendor's, or the physician's, or the lawyer's privilege on the immoveable as well as on the moveable property of their debtors.

☞ The court took time to advise.

ROUSSEAU vs. *HENDERSON & AL.*

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After the trial has been gone into and evidence heard, it is too late to pray for a continuance.

A party without a title can avail himself of no prescription but that of thirty years.

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court. The plaintiff avers, that she is the owner of a tract of land, situated on the right bank of the river, about four miles from New-Orleans, having a front of six arpents by the depth of forty, lying behind a plantation formerly belonging to Margaret Wiltz, in virtue of a grant to her ancestor by Don Bernard Galvez, dated 6th August, 1778; upon which, she states a certain George Henderson has entered, and pretending that he is proprietor, refuses to give her possession. She prays for his eviction from the premises; and to have damages for the illegal entry.

The defendant pleaded the general issue, and cited Stephen Henderson in warranty, who answered by calling in his vendors, S. Allain, V. Allain and A. Allain. They appeared; and vouched Constance Rochen and Fergus Duplantier, who prayed, that the persons from whom they purchased, the executors of B. Lafon, should be cited to defend the title.

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The last mentioned parties appeared, and in addition to the general issue, pleaded prescription of ten, twenty and thirty years.

There was judgment for the plaintiff, and the defendants appealed.

Three bills of exceptions were taken on the trial. Those of the plaintiff need not be examined, and that of the defendant presents no difficulty. It was to an opinion of the court, refusing a continuance after the trial had been gone into, and evidence heard; in which we entirely concur, and think the judge did not err in refusing the application.

The plaintiff produces a grant to her ancestor, Jacinto Panis, for the premises; the only questions then presented for our inquiry are. Have the defendants acquired that title? or, have they an adverse one, which is superior?

They insist they have both, and rely on a purchase from the plaintiff's ancestor and prescription.

The testimony establishes, that Jacinto Panis, the original grantee, intermarried with Margaret Wiltz, who owned the plantation of six arpents front and forty deep, between the tract granted, and the river; and it is on an act of sale of the said Wiltz and Panis of the 8th

of April, 1785, that the defendants principally rest their pretensions of having acquired the property by purchase.

But that document falls far short of establishing the fact for which they introduced it. It is in the usual form of public acts, where the husband assists his wife in the disposal of her immoveable property; and it states, that there is sold to Antonio Joseph Piguery, a plantation consisting of six arpents front, with the ordinary depth, situated a league from the city, it being the same which the vendors acquired by an act of retrocession from Don Pedro Daspy. We look in vain, to this instrument, for proof of the sale of the premises in dispute; the act says ordinary depth, which is forty arpents, and it required them to sell eighty, to include the tract of Panis. There is no proof, that the land he acquired from the Spanish governor ever made a part of madame Wiltz's plantation, and what puts the intentions of the parties beyond doubt is, that they declare they sell a tract which was retroceded to them by Daspy, and Daspy, as it is proved in evidence, held only six by forty. *Macarty* vs. *Foucher*, *ante*, 114. *Innis* vs. *M'Crummin*, *ib.* 425.

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Having thus ascertained, that the only act by which it is alleged the ancestor of the plaintiff alienated the property did not, in fact, divest him of his title, it is unnecessary to inquire into the conveyance of his vendees, who could not make a right to themselves, by inventorying the lands of others, and disposing of them.

On the plea of prescription, as the defendants are without title, nothing can avail them but that of thirty years, and the evidence negatives actual possession.

We express no opinion in respect to St. Pe, who, it appears, bought eighty arpents in depth—he is not a defendant.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Denis for the plaintiff, *Cuvillier* for the defendants.

BOUTHEMY vs. *DREUX & AL.*

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BOUTHEMY *vs.* DREUX & AL.

A will may be proved by a single witness. A witness may contradict enunciations in a will.

The names of the witnesses need not be inserted in the body of a nuncupative will, under private signature.

Whether all the witnesses should sign at the same time.

Facts which depend on proof, should be alleged, that the adverse party may disprove them in the inferior court.

The presentation of a will to the witnesses needs not be *manual.*

The circumstance of a judgment being rendered on a petition written in French, does not make it *void. Quære* if *voidable?*

APPEAL from the court of the first district.

PORTER, J.* delivered the opinion of the court. This action is brought by the heirs of Pierre Bouthemy, deceased, to annul and set aside his last will and testament; or, in case it is declared valid, to have certain legacies granted by it avoided, and the executor compelled to render an account of his administration. The case has been already before us, and was remanded for further proceedings. 10 *Martin*, 1.

It has been tried on its merits. The district court gave judgment for the defendants, and the plaintiffs have appealed.

In this court, they have relied on the following grounds for the reversal of the judgment of that of the first instance:—

1. The legacy of the universality of his furniture, bequeathed by the testator to his concubine, is void. *Civil Code*, 210, *art.* 10, and 232, *art.* 115.

2. The will is void, not being clothed with

* MARTIN, J. did not join in this opinion, having some interest on the question.

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the formalities required by law, to give it validity. *Civil Code*, 228, *art.* 96–232. *art.* 108.

3. The proceedings had on the will, before the court of probates, are void, for not having been preserved, and conducted in the language in which the constitution of the United States is written. 1 *Martin's Dig.* 114. 2 *Martin's Rep* 227, 10 *ib.* 1.

The first point has been abandoned in argument, and the conclusions which we have come to on the second, will render a decision of the last, unnecessary at this stage of the cause.

In support of his second ground, the counsel for the plaintiffs has contended: that the names of the witnesses should be inserted in the body of the testament; that the proof of its execution has been only made by one witness; that the testator did not *present* the will to the witnesses; that, admitting the court should be of opinion that he did, it was not to a sufficient number of them; and lastly, that the witnesses did not all sign at the same time.

The first of these positions, in the order necessary for an examination of the case on its merits, is that which objects to the proof by one witness of the will, and the facts connected

with its execution. In support of it we are referred to the *Civil Code*, 310, *art.* 243–244; where it is said, it is provided, that the single testimony of a witness can only be received, to establish facts, when the value of the object does not exceed the sum of $500, or there is a commencement of proof in writing.

These provisions of our law do not extend to such a case as that before us. They expressly limit the incompetency of a single witness, to cases where the establishment of a covenant (*convention*) is made to depend on his testimony. Now a will is not a covenant.

The other grounds, on which it is contended the nullity of the testament must be decreed, will be better understood by stating the evidence received in respect to its execution.

The will is a nuncupative one, under private signature, and purports to be made in the presence of the witnesses. But according to a document introduced by the plaintiffs, it appears, that the witnesses in proving it before the court of probates declared, that it had been written out of their presence, and one of them added, that it was written at the solicitation and request of the testator, who certified it in presence of the witnesses

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and signed it, and declared that it was his last will.

On the trial it was proved, that the will was signed in the hand writing of the testator, and Le Cesne swore, that he was present when Bouthemy signed the instrument, and that the witness saw him affix his name thereto, and four other witnesses sign it; that he was in his bed, and that one Desbois, read over the will to the witness in his presence; that Bouthemy requested Desbois to read the testament to the witnesses, which he did, and that Bouthemy told the witnesses that it was his testament.

This testimony was excepted to; but the doctrine is well settled in this court, that witnesses to a will can be received to contradict enunciations contained in it. *Knight* vs. *Smith*, 3 *Mart.* 156. *Marie* vs. *Avarts' heirs.* 10 *ib.* 25.

To the validity of the instrument established by this proof, it is objected, that the names of the witnesses should be inserted in the testament, as well as written at the bottom of it. On referring to the *Code*, where the manner of making a nuncupative act, under private signature, is prescribed, we find certain acts necessary in order that it be valid, and a declaration that *no other formalities* are required

As inserting the names of the witnesses in the body of the act is not one of these formalities, we cannot say it should make one of them, for we are forbid to require any other but those which the law has enumerated. *Toullier, Droit Civil François, 5, l. 3, tit. 2, c. 5, n. 180.*

We give no opinion on the objection, that all the witnesses should have signed at the same time, for we think it comes too late. As it was a matter which depended on the proof that might be adduced, the plaintiffs should have alleged it in the court below, and given the defendants an opportunity to contradict it. From the course which the examination of the witnesses took, it appears, such a fact was not considered to be at issue; nor was it, by the pleadings. The original petition alleges two grounds of nullity, viz. that the testament was not written by the testator, nor by any other person from his dictation, in the presence of the witnesses; and that it was not presented by him with such a declaration as the law requires, when written out of their presence. The supplemental petition adds, that neither the names nor the domicil of the witnesses were mentioned in the will; and that the proceedings had before the court of probates,

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under it, were void, because they were not conducted in the language in which the constitution of the United States is written.

The great question in this case is, whether the will was presented by the testator to the witnesses, in such a manner as the law directs. The formalities which the legislature have prescribed, as guards against the frauds which men from feebleness of mind and body are exposed to in their last moments, are matters of strict law, and courts have been severe in exacting a rigid observance of them. We think, however, that a scrupulous attention to forms can be well reconciled with a decision which will give effect to the instrument now submitted.

For the validity of a nuncupative will, under private signature, it is sufficient if the testator, in the presence of five witnesses, presents the paper on which he has written his testament, or caused it to be written out of their presence, declaring to them that that paper contains his last will; that he signs it, if he knows how or is able, and that the witnesses, or one of them, also put their names to it.—*Code* 228, *art.* 95.

In the case before us, it has been proved,

that the will was written by the direction of the testator, that it was read over to him, and that it was signed by him; but it is objected, he did not *present* the testament to the witnesses and *declare* it to be his. We do not understand the law to be, that these words are so material, and of such solemnity, that they cannot be supplied by others expressing the same ideas. Directing an instrument to be read over to witnesses, accompanied with the testator's assertion, that it was his last will and testament, (as, is in evidence, was done here) we think the same thing, as if he had *declared* it to be his. We are also of opinion, the will was *presented*. This word, in the sense in which it is used in the law, means, to exhibit to view, or notice, and is fully satisfied by the testator's requesting his will to be read over to the witnesses, and telling them it was his. We are unable to find any force in the argument, that the instrument should be delivered by the testator, with his own hand, to the witnesses; a ceremony which would often deprive the citizen of the power of making a will at all; as the instances are frequent where bodily weakness would render it impossible to do so, though the mind was sound and healthy. The

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object of the legislature was, that the act should be transmitted from the testator to the witnesses, in their presence, in such a way as to make it evident, it emanated from him.—The court of cassation in France has held, in construing a law on the same subject, expressed in the same words as ours, that the presentation need not be manual, that the object of the law was to guard against a false testament being substituted in place of the real one, and that object was accomplished when the testator either presented it with his hand, or indicated it by gestures or signs. *Sirey*, 14. 458. 18 *ib.* 210.

On the last point made, that all the proceedings had under the decrees of the court of probates, are void, and that the whole estate must be given up with its rents and profits, we give no opinion. On examining the evidence, we find that the orders and judgments of the court are in the language in which the constitution of the United States is written; and we are far from being prepared to say, that the circumstance of their being rendered on petitions written in another language, will so affect them with nullity, as to render every thing done under them void—whether they

can be contended to be any thing more than voidable. The effect, however, of the proceedings can with more propriety be decided on, when we know what they were. As there is a prayer for the executor to give an account of his administration, the law can be better applied to the various acts of it, when the evidence of them are before us, than by laying down, at this stage of the proceedings, any general rules, as to which of them may be good, and which of them invalid.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, be annulled, avoided and reversed, and this cause be remanded with direction to the judge, to compel the executor to render an account of his administration according to law; and it is further ordered, that the appellees pay the costs of this appeal.

Seghers for the plaintiffs, *Cuvillier* for the defendants.

EVANS & AL. vs. *GRAY & AL.*—*ante* 307.

Former judgments undisturbed.

APPEAL from the court of the first district.

MARTIN J. delivered the opinion of the court. We have considered the reasons of-

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fered by the plaintiffs' counsel, in support of his application for a rehearing, with all the attention, which the earnestness with which he has pressed it and the pains he has taken, were calculated to excite.

It is not denied, on his part, that the facts set forth in the defendants' answer, if true, would entitle them to obtain a restoration of part of the price, by way of damages, in an action instituted by the plaintiffs, in the courts of Kentucky; but it is said, that they would unsuccessfully urge their claim for a diminution, by a plea to the plaintiffs' action for the price. The reason is, that the action *quanti minoris* is unknown to the courts of those states, in which the common law of England affords the only legitimate rule of decision.

Courts of justice there, can rescind a contract of sale *in toto* only. Hence, in an action for the price, they cannot restrain their judgment to a partial recovery. Not so in this state, where the vendee is entitled to a reduction of the price, by the action *quanti minoris*. If he may be relieved *in toto*, by plea, when he insists on the rescission of the sale, and prays to be exempted from the payment of any part of the price, why should he not be

listened to when he restrains his plea to that part of the price which the vendor would be compelled to return, if a suit was brought against him.

The rights of the parties in a contract of sale will finally be adjusted in the same manner in Kentucky and Louisiana, although, in the latter state, the vendee may obtain by *plea* the relief which, in the former, can only be had by *action*. A difference exists only in the *mode* of relief; the *quantum* is perfectly the same.

M'GUIRE vs. *AMELUNG & AL.*

Parol evidence is good to establish possession of, though not to form title for real estate.

Giving a slave in payment of services, as a house keeper, is not a donation pure and simple, and the act conveying it need not be by public act.

A want of title in the vendor does not render void the act of sale, if he afterwards acquire the right of the true owner.

APPEAL from the court of the third district.

PORTER, J. delivered the opinion of the court. Amelung, sheriff of Baton Rouge, having several executions in his hands on judgments obtained against E. F. Hall, in order to satisfy the same, levied on a mulatto wench, who is claimed by the plaintiff in this suit as her property.

She exhibits a private act, attested by one witness, which was afterwards recorded in the office of the parish judge, at Baton Rouge. It is in the following words, viz.—

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"Know all men by these presents, that I, Elisha F. Hall, lieutenant of the 7th reg't U. S. infantry, at the fort of Baton Rouge, this 4th day of June, 1814, presented and gave unto Miss Mary Lucas M'Guire, of this place, a mulatto girl named Grace, about nine years, which girl I bought of col. Phillip Hickey, of this parish, in consequence of said Mary Lucas M'Guire's services as house-keeper, and, I do, by these presents, relinquish all my right and title for ever, of said mulatto girl, Grace, for her own use and benefit for ever.

(Signed) E. F. HALL."

There was judgment against her in the district court, and she appealed.

The cause has been submitted without argument, and our attention, on perusing the record, is first arrested by bills of exceptions.

The first is to the refusal of the district judge to receive the instrument, just recited, as evidence of a sale. In this opinion we think he did not err, for, to constitute that contract, it is necessary, that a thing be given for a price in current money. *Civil Code*, 344. *art.* 1.

The second is to the opinion of the judge rejecting parol proof of ownership and possession, unless to establish that the plaintiff

had acquired the slave by inheritance; and in which opinion we concur, so far as it went to exclude any other evidence of title but that by writing, unless in the case of descent. As to possession, parol evidence was properly offered to establish it, and as it appears from the statement of facts, was indeed received.

The third bill of exceptions was taken to the decision of the judge refusing to permit the plaintiff to prove the value of the services, mentioned in the act already referred to, and we think correctly taken; for, unless the plaintiff was refused permission to give such proof, on the ground that, as the cause then stood, it was not necessary for her to make it, we are clear that there was error in rejecting the testimony offered.

The contract by which the plaintiff claims, is one of those which, though not forming the contract of sale, clearly resembles it, or rather, it is nothing else but a *dation en paiement*, which differs in few particulars from a sale. *Pothier* denominates an act, such as that now under consideration, *La donation rémunératoire*, and with his accustomed accuracy tells us: "*Lorsqu'une donation réminératoire est faite pour récompense de services mercenaires appreciables a*

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prix d'argent, et pour lesquels celui qui les a rendus auroit action afin d'en obtenir la recompense : si la valeur des choses données n'excede pas celle des services, une telle donation quoique qualifiée du nom de donation par l'acte qui en a été passé, n'a de donation que le nom, et c'est une veritable dation en paiement." *Pothier, Traite de Vente*, 607. The act before us, is certainly quite distinct from that of a pure and simple donation, to which it was likened by the judge of the first instance, and he erred in holding it void, because it wanted the forms required by law to give validity to such contracts. It is one of mutual interest, not of beneficence. *Pothier on obligations*, n. 12.

If the case therefore required it, we would remand the cause, to give the plaintiff an opportunity of proving the consideration; but neither the pleadings, nor the evidence taken, renders it necessary to do so. Fraud is not alleged by the creditors in the answer; the only fact put at issue is title. No proof was given on trial, that the conveyance was made to defraud the defendants. On the contrary, the execution of the act under which the plaintiff claims, is established to have been six years before the property was levied on by the sheriff: and it is in evidence, that she, once

in this space of time, hired the slave out as her own, and that she was considered in the family, and acknowledged by Hall, to be the property of the petitioner.

As to the objection of want of title in Hall, at the time he made the conveyance, it is sufficient to remark, that admitting this objection could be made by any other than the purchaser, which we much doubt, still a want of title in the vendor does not make void a conveyance of property, if he afterwards acquire the right of the true owner. This question lately received our most serious consideration, and we see no reason to change the opinion expressed in the case of *Bonin* vs. *Eyssaline, ante,* 188.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, be annulled, avoided and reversed, that the plaintiff do recover of the defendants the possession of the slave mentioned in the petition, and that the injunction granted by the district court be made perpetual, saving, however, to the defendants all the rights which the law gives them, in case the conveyance or sale to the plaintiff was made to defraud them.

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And it is further ordered, adjudged and decreed, that the defendants pay costs in both courts.

Duncan for the plaintiff, *Eustis* for the defendants.

GUIROT vs. *HER CREDITORS.*

A final conveyance cannot be decreed, without hearing the debtor.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The insolvent prayed for a meeting of her creditors, that they might deliberate on the state of her affairs, and grant her a respite of twelve, eighteen and twenty-four months.

The parish court ordered the meeting, at which the creditors present refused to grant the respite, appointed syndics and voted for a cession of the debtor's goods, and that the same be sold.

The parish court homologated the proceedings, so far as they regard the appointment of syndics, which it confirmed, and that they might proceed in the premises, ordered that the sheriff deliver to them all the property of the insolvent, seized or sequestered. She appealed.

Her counsel assigns as errors apparent on the record,

That she prayed for a respite only, and her creditors had no authority to proceed further, and direct a cession; and the judge erred in confirming the appointment of the syndics and directing the insolvent's property to be delivered them for sale.

The case has been submitted to us without any arguments.

The insolvent made no *voluntary* cession of her goods; a *forced* one cannot be decreed without the debtor being heard. We held so in the case of *Weimprender's syndics* vs. *Weimprender & al.* 11 *Martin*, 18.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed.

Seghers and *Cauchoix* for the plaintiff, *Morse* for the defendants.

BOYER & WIFE vs. *AUBERT & AL.*

A mistake in a name, by the omission of a letter, can only be taken advantage of, by a plea in abatement.

APPEAL from the court of the second district.

PORTER, J. delivered the opinion of the court. This case is brought up by the ap-

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pellees, who pray that the judgment of the court below should be affirmed, and with damages. There is no difficulty in acceding to the first part of the prayer; the only question is, as to the second.

The suit was instituted on a promissory note. The petition is in the name of Derie Boyer and Celeste Barras, his wife, and states, that the defendants made their note, which is annexed to the petition, and makes a part of it, by which they promised to pay unto Desiré Boyer the sum claimed.

The note, when produced on the trial, appeared to be made payable to Desiré Boyer, at least it is so written in the copy transcribed on the record, filed in this court. But in the bill of exceptions taken to its introduction, it is stated, that the plaintiffs having offered a note payable to *Derié* Boyer, the defendants opposed its being read in evidence, because it did not support the petition.

There was judgment for the plaintiffs, and the defendants moved for a new trial, on the ground. that the note which had been proved, was payable to Desiré Boyer, a statement in direct contradiction to that contained in the bill of exceptions, which declares that the

note was executed in favour of *Derie* Boyer. The judge, in refusing this application, acts upon the idea that it is payable to *Derie*, but says it is sufficiently described in the body of the petition.

It is somewhat difficult to imagine how so much confusion could be created on a matter which must have been extremely simple in itself. The allegations, made in moving for a new trial, are in direct opposition to those contained in the bill of exceptions. As the party, therefore, who might claim the benefit of them, contradicts himself, we shall alone consider the statement contained in the petition, and the expressions used in the note; and see whether there is such a variance between them as gave the defendants just and reasonable grounds to appeal from the judgment of the district court.

The note, as set out in the petition, corresponds exactly with that produced on the trial; the *allegata* and *probata* concur, and the defendant was apprized on what suit was brought, and protected against another demand for the same cause of action. The only ground then for the defence, was a mistake in regard to a letter in the name of the plaintiff; and it is

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clear, that such an error cannot be taken advantage of on the general issue; it must be pleaded in abatement. *Curia Phillipica*, 1, § 13, *n.* 1. *Febrero*, 2, *l.* 3, *c.* 1, § 4. *n.* 176. *Partida* 3, 3, 9.

The judgment bears interest at ten per cent. and we think it sufficient to affirm it with damages at five per cent.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with five per cent. damages.

Workman for the plaintiffs, —— for the defendants.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, FEBRUARY TERM, 1823.

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NUGENT *vs.* ROLAND.

NUGENT vs. *ROLAND.*

APPEAL from the court of the fourth district.

A promissory note, in which the sum is stated in figures, is valid.

MARTIN, J. delivered the opinion of the court. The plaintiff claims $760 for the board of the defendant, and for part of his enclosures and out houses, occupied by the defendant's horses, gig and goods; and two dollars and forty cents, for coffee and candles. He gave credit for $28, for six demijohns of wine, leaving a balance in his favour of $734 40 cts.

The defendant pleaded the pendency of a suit for the same cause of action, in the parish court; that he was not liable to pay the sum claimed, nor any part thereof; that the plain-

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tiff owed him $900 for money lent, goods sold, and $200 92 cents on a note of hand; and urged that the claim in the petition, if it ever existed, was thereby more than compensated, and he prayed judgment for the balance.

The jury gave a verdict and the court judgment, to the defendant, for $53 and costs. The plaintiff appealed.

Poydras deposed, that in December, 1821, he was requested by the plaintiff to settle a claim which the latter had against the defendant, who, on being spoken to declined attending thereto at the moment, for want of time, as he could not then draw an account which he had to offer in compensation; that a week after, the witness went to the defendant, who presented his account, and the witness settled the plaintiff's claim for eighteen months board, at $200 a year, the price which the plaintiff charged, and found a balance of $190 against the defendant, who offered his note at three or six months. He afterwards gave to the plaintiff a barrel of wine valued at $20, as part payment, which reduced the balance to $170. He, at the time, mentioned his having a note of the plaintiff's, which had been mislaid. He did not give any note to the plaintiff, who

would not take one at so long a period, but offered a gig in payment. He afterwards showed the witness a due bill of the plaintiff's in the following words and figures, "I owe Mr. L. Rolland $200 92. July 22d, 1820. H. P. Nugent."

The plaintiff asked a witness whether he was in the habit of giving notes, in which the sum was stated in figures; but the court thought the question improper.

Other witnesses were heard, as to the price of board in the place, and mentioned several prices.

The plaintiff's counsel urges, that a note, in which the sum to be paid is stated in figures, is void; and that the court erred in receiving that mentioned in the answer, as evidence.

To establish his proposition, the counsel shows that a promissory note is held by law to be of equal validity, and entitled to the same faith and credit, with acts passed before a notary public; and he hence concludes that, as notaries must write out in full all their words, without abbreviations, and shall not otherwise express the name of a person, of a place, nor a sum of money, or any thing else, otherwise the act to be void, notes of

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hand are void in which the name of either party, the place or the sum is otherwise expressed than by *words* written out in full.

Neither the premises nor the conclusion can be granted.

The notarial act is an *authentic*, the promissory note a *private* one. The first a *matter of record*, the other a *matter in pays.*

The first, must be executed in the presence of *two* witnesses; the other does *not* require the presence of *any.*

The verb *to express*, in our opinion, may properly be used to denote the designation of a sum of money, either in words *or* in figures.

Of this, the counsel for the plaintiff furnishes us with examples. *Beawes* recommends, that the sum be distinctly *expressed*, both in words and *figures.* The *Recopilacion* requires, that notaries should not *express* sums of money, *otherwise than by words.*

In what a situation would we place our banks, were we to decide that the strict rules to which notarial acts are subject, extend to bills and notes. In the latter, the names of the parties are very seldom indeed written out at full length. The first name is generally abbreviated—the words, value received—long

names of cities, such as Philadelphia, Nouvelle Orleans, &c. are frequently so. A considerable portion of the paper in circulation would, by the decision which is pressed on us, be avoided.

It is certainly very unsafe, and may be said improper, to state the sum to be paid in a bill or note in figures; but no law avoids a bill or note on that account, and authorizes us to allow a person, who gives such a bill or note, to avail himself of his own wrong and get rid of his obligation.

We are of opinon, the district judge did not err in refusing to prevent the document produced to go to the jury, on the ground that the sum was there stated in figures.

It is therefore ordered, adjudged and decreed, that the judgment be affirmed with costs.

Workman for the plaintiff, *Davesac* for the defendant.

HASLUCK vs. *SALKELD & AL.*

If a vessel, on board of which property is shipped, is detained by irregular attachment sued out against it, the freighter is not

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The petitioners state, that they placed notes, of different individuals, in the hands of

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the defendants for collection, and that there is a balance due on the amount received by them of $500, which they refuse to pay over.

This claim is contested on the ground that the plaintiffs once shipped on board of a vessel called the Ajax, belonging to George Lloyd, acting partner in the house of Salkeld, Lloyd & Co. a quantity of tobacco, which, after it was on board, was attached by sundry persons having claims against the plaintiffs, by reason whereof the vessel was detained for a long space of time, and injury sustained to a greater amount than that now demanded of the defendants.

responsible to the owner of the vessel for the delay. His remedy, if any, is against the attaching creditor.

The plaintiffs insist, that these attachments were illegally sued out, and were afterwards abandoned by the parties at whose prayer they issued. The district court, however, gave judgment against them, and they have appealed.

The evidence shows, that in the case of Stockton, Allen & Co. against the appellants, the tobacco which had been attached on board the Ajax, was released by the plaintiff; and that Patterson and Philpot, at whose suit it had also been seized, discontinued their action.

The cause has been submitted without argument; and after a very attentive consideration, we are unable to find any satisfactory ground for affirming the judgment of the court of the first instance. The proceedings had in the suits, which occasioned delay in the departure of one of the vessels of the defendants, certainly exclude the idea of any fault on the part of the plaintiffs; and if, as it appears to us was the case, their property was illegally or without sufficient cause seized, it is enough that they should bear that injury without being made answerable for the damage which third persons may have sustained by it. If any person is responsible, it is him who sued the attachment and did not prosecute it with effect.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that the plaintiffs do recover of the defendants the sum of five hundred dollars, with interest from the judicial demand, and costs of suit.

Hennen for the plaintiff, *Grymes* for the defendants.

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MAYHEW
vs.
M'GEE.

MAYHEW vs. *M'GEE.*

After proceedings commenced for a forced surrender, suit cannot be carried on by a single creditor.

APPEAL from the parish and city court of New-Orleans.

PORTER, J. delivered the opinion of the court. The petitioner claims of the defendant $955 10 cents, who, admitting the justice of the greater part of the demand, pleads that proceedings are pending against him, at the suit of his creditors, for a forced surrender.

We think the objection a good one. It has already been settled by this court in the case of *Chiapella* vs. *Lanusse's Syndics*, 10 *Martin*, 448, that in case of a forced surrender, one of the creditors could not carry on legal proceedings in a distinct suit, against the insolvent for the recovery of his debt. To permit it, would indeed defeat one of the important objects of our laws on this subject, which is to secure a legal distribution of the bankrupt's estate to all who have demands against it.

The judgment of the parish court is affirmed with costs.

Carleton for the plaintiff, *Morse* for the defendant.

BOUDREAU vs. *BOUDREAU.*

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Prescription cannot be pleaded in the supreme court.

Parol evidence, though not admissible as to title, is so as to possession.

APPEAL from the court of the second district.

MATHEWS, J. delivered the opinion of the court. This is a petitory action, brought to recover a certain tract of land described in the plaintiff's petition, and in support of his claim he offers in evidence a title in due form, derived from one Lambert Bellardin, dated in February, 1805. To this title the defendant opposes one derived from the same vendor, made in May, 1810. The petition also contains a prayer for the annual rents and profits of said land. Judgment was rendered in the court below, in favour of the plaintiff, both for the recovery of the property, and damages for the use and occupation by the defendant, as being a possessor in bad faith; from which the latter appealed.

Several bills of exceptions were taken by the appellant, to opinions of the district court, given in the course of the trial. These exceptions have not been much insisted on in argument before this court; and, as we believe from the pleadings, as they appear on the record, that the opinions excepted to were correct, they may be dismissed without

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further comment. The title alleged and proven on the part of the plaintiff, is clearly the best, being evidence of a sale to him anterior to that made to the defendant, and was accompanied by tradition of the thing sold.

But an attempt is made to show title in the appellant, by a prescription of ten years; which was not pleaded in the court below. The plea of prescription is offered to this court, as being authorized by law. It is true, there are expressions in our laws which permit prescription to be pleaded in a cause, even on an appeal. Those rules were made for courts of appeal which try a suit *de novo;* and might well receive new pleas, because they could have new evidence on them. By the constitution this is a court of *appeal only.* The legislature, in organizing it, have established rules, the whole tenor of which shows their intention to be, that its powers should be exercised almost exclusively in the correction of errors committed by the inferior tribunals of the state, and such alone as appear of record, transmitted to the supreme court as prescribed by law.

When the whole cause is legally sent up, the evils of which the parties complain can be

remedied; by affirming judgments with damages; by reversing them and giving such judgment, as ought to have been given in the lower courts, or by remanding causes for new trials when justice requires that mode of proceeding. We are clearly of opinion, that neither the constitution of the state, nor the acts of the legislature under it, organizing the court of appeals, and establishing rules of procedure therein—will authorize us to admit new pleas, or new evidence in any suit: and consequently the law, which heretofore permitted such pleas and evidence on an appeal, is virtually repealed and abrogated by the state constitution and subsequent acts of the legislature; their provisions being clearly contrary and repugnant to the former law.—The plea of prescription, here offered, must therefore be rejected. Even had it been regularly pleaded in the court below, we doubt much, any good effect from it to the defendant's side of the cause.

The plaintiff having shown the best title to the land in dispute, is clearly entitled to recover it: and so far as the judgment of the district court goes to establish his right of property, it is, in our opinion, correct. But we

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cannot agree with that court, to adjudge damages against the defendant as a knavish possessor. The definition in the *Code* of this kind of possessor, is clear and explicit, viz. he who possesses as master, knowing that he has no title, or that his title is vicious and defective. Now, so far from the evidence, in the present case, establishing the existence of any such knowlege in the appellant, it shows quite the contrary; 1st. the prior purchaser gave up the property to the original owner, who remained in possession of it for nearly three years, before he sold and conveyed to the defendant, to whom he delivered it; 2d. this latter has remained in undisturbed possession under a title, translative of property, for nearly ten years: from which, the inevitable conclusion is drawn, that he was an honest possessor, up to the judicial demand, and consequently no damages ought to be adjudged against him beyond that period. In this view of the case it is seen, that we do not admit the oral evidence to influence the written documents of title, as they relate to the right of property, but confine them entirely to that of possession.

It is therefore ordered, adjudged and de-

creed, that the judgment of the district court, be avoided, reversed and annulled; and proceeding here to render such judgment as ought there to have been rendered, it is ordered, adjudged and decreed, that the plaintiff and appellee, do recover from the defendant and appellant, the land in dispute, and damages for its use and occupation, at the rate of one hundred and twenty-five dollars, from the judicial demand, and that is from the 28th day of May, 1820, until the property shall be delivered up to the plaintiff; reserving to the defendant his right of action, if any he have, for the improvements made by him on said land, during his occupancy: costs of this appeal to be borne by the appellee.

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Workman for the plaintiff, *Morse* for the defendant.

PEPPER vs. PEYTAVIN.

APPEAL from the court of the second district.

If he who bind himself to deliver sugar, fail to do so on the day fixed, the creditor may demand damages in money.

A note payable in sugar is not negotiable.

Moreau, for the defendant. The district court erred in condemning the defendant and appellant to pay a sum of money, without saving his right to pay in sugar, according to his

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contract; and in refusing to require the plaintiff to give security to indemnify the debtor, in case the note, which the former alleged to be lost, should have been transferred.

Will it be said that the defendant lost the faculty of discharging his obligation, by the delivery of sugar, as he either refused or neglected to comply with his engagement on the day of payment? It is in evidence, that he did every thing in his power to comply with his promise. Langhorne, the agent and witness of the plaintiff, deposes, that he was prevented from taking the sugar, the steam-boat in which he was having passed the defendant's plantation, during the night, and the master having refused to stop; and the sheriff has declared, that when he served the citation on the defendant, the latter told him, the sugar was ready when Langhorne passed by, and he regretted he could not stop.

Neither can it be urged, that this faculty was lost by the defendant refusing to pay, and compelling the plaintiff to sue. While the latter alleged the loss of the note, the former had the right of withholding payment, till he was indemnified.

The district court has been of opinion, that

the note not being payable in money, was not negotiable. This is the first time we heard it said that a note payable to order, in sugar or cotton. Notes cease to be negotiable at their maturity and after protest. The present was not payable on any fixed day; was exigible immediately.

The holder of a bill, who alleges its loss, is bound to indemnify the payor. *Pothier, Change*, 131.

Workman, in reply. The debtor in this case is liable for all the damages resulting from the non-performance of his obligation: in other words, he ought to indemnify the creditor, not only from the loss which the non-performance of the obligation has occasioned him, but also, for the gain of which it has deprived him. The English courts have decided, 2 *East*, 211, that the proper damages upon an agreement for the transfer of stock, was the *highest price*, which it had been at since the time when the agreement ought to have been performed. A much higher scale of compensation is allowed by the *Code*, which we consider as the common law of this state, in civil concerns. In the law of the *Code*, *de sententiis*

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quæ pro eo quod interest proferuntur, (*lib.* 7, *tit.* 47.) *Justinian* ordains, that in all cases where the nature and quality of the thing are certain and determinate, as in sales, &c. the damages and interests may not exceed double the value of the thing, which forms the object of the contract. A. Peytavin, then, may think himself highly favoured by the judgment from which he has hazarded this appeal; a judgment which gives the injured party the very lowest rate of damages which could have been awarded in such a case; that is, the price of the article, fixed by the parties themselves, at the time when the obligation to deliver it ought to have been performed.

The note being payable in sugar, was not negotiable, and the defendant cannot require to be indemnified. It is an *essential* quality to the validity of a promissory note, as such, that it be payable in *money*. *Chitty on bills*, 54. A note payable in goods, is not negotiable, 2 *Mass. Rep.* 524.

MARTIN, J. delivered the opinion of the court. The plaintiff states, that he sold a quantity of flour, amounting to $717 50 cents, payable in sugar, at the rate of seven and a

half cents the pound—that the defendant gave him his obligation therefor, which, before the payment of it or any part thereof, was fortuitously lost or stolen—that the said obligation was not transferred.

The defendant pleaded the general issue.

There was judgment against him, and he appealed.

His counsel urges, that the judgment ought to have reserved to the defendant the faculty of paying *in sugar*, and ordered the plaintiff to give security, to indemnify the defendant.

The defendant has not urged, that he was ready to pay in sugar, according to his promise, but has denied, that he made the obligation on which he is sued. Under this plea he cannot contend he was always, and is still ready to deliver sugar. His obligation has therefore been, by his own act, turned into one to pay damages for the neglect to perform the original one, if the plaintiff demand those damages, *i. e.* the value of the sugar, at the time and place of delivery. The creditor of an obligation payable in produce, may on the failure of the debtor, provide himself with produce of the same kind at the market price, and require a sum equal to the purchase as

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damages. As such a purchase is a matter in which the defendant is without interest, damages may be demanded without its being made.

The obligation to deliver the sugar was not such a negotiable paper, which might render the debtor liable to its assignee, without notice—as a promissory note for money, or a bill of exchange. The safety of the defendant does not require any security: for admitting that the obligation was assigned, the assignment would be completed by the notice given to the debtor. This is not pretended to have been done; and were it done, the defendant would be protected by the *merger* of his obligation in the judgment obtained on it.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Workman for the plaintiff, *Moreau* and *Dumoulin* for the defendant.

WOODRUFF vs. *PENNY'S BAIL.*

A *ca. sa.* must be returnable in no less than 60, nor more than 90 days.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. A *capias ad satisfaciendum* issued against

Penny on the 26th of November last, returnable on the third Monday of December following, and was returned *non est inventus.*

The bail being notified, surrendered the principal in open court. The plaintiff's counsel objected to the surrender, as being too late, after the return of the *ca. sa.*; but the court was of opinion "that the *capias*, under the act of 1817, should have been made returnable in no less than sixty nor more than ninety days, and could not be legally returned *non est inventus*, in less than sixty days from the day it issued," and ordered the principal in the custody of the sheriff, and the bail-bond to be cancelled.

The plaintiff appealed.

Gordon deposed, he is and has been clerk of the court of the first district, since its organization, and was clerk of the superior court of the late territory from the year 1809 till the formation of the state courts; that during the time he has been in office, it has been the practice both in the superior and district courts to make writs of *capias ad satisfaciendum* returnable in 15, 20, or 30 days from the date, at the option of the plaintiff. Before his appointment as clerk of the su-

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perior court, there was no execution docket kept. Since, one has been always kept in each court, a reference to which, shows the period at which each writ of *capias* was made returnable.

Holland, the deputy sheriff, deposed, he took the principal in pursuance of the court's order, and informed the plaintiff's attorney he would not detain him unless a sum was advanced for his subsistence and the fees. The attorney at first declined, but soon after consented to make the advance for one week, and tendered a $10 note; but the witness not being able to produce the change, the attorney promised to pay in the morning; the principal was then committed, and on the following day was admitted to the bounds. The plaintiff's attorney declined making any advance or having any thing to do with the prisoner.

It is admitted the plaintiff resides in St. Francisville.

The plaintiff and appellant's counsel urges, that the district court erred as the bail was fixed, under the act of 1821, p. 58; that the *capias* was made returnable according to the long established practice of the district court, which has become a rule and mode of proceeding, which could be changed only by law

or a rule of court; that the act of 1817, cited by the district court, relates to writs of *fieri facias only*; that if no fixed practice exists, with regard to the writs of *capias ad satisfaciendum*, it should be governed by the English common law, from which it came, according to which the bail in this case is fixed.

We are of opinion, that the writs of *ca. sa.* are included in the word *execution*, used in the act of 1817. The word is comprehensive enough to include them, and there is no good reason to conclude that the legislature should fix the day of return of the *fi. fa.* and leave that of the *ca. sa.* at the caprice or worst views of the plaintiff. This idea is strengthened by the consideration that the bail is fixed with the debt, and cannot surrender his principal after the return-day of the *ca. sa.* (1821, p. 58.) Now, if the plaintiff is to be the judge of the length of time, during which the bail may exercise his legal right of surrendering, will he not always direct this return to be within the shortest period possible? If the clerk of the first district thinks he may make a *ca. sa.* returnable in a fortnight, if the plaintiff insists on it, may not that of the second think himself justifiable in accommodating a plaintiff

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with a *ca. sa.* returnable in ten or a less number of days?

That construction, which leaves the bail so much at the mercy of the plaintiff, is not to be favoured.

It is true, the act of 1817, after fixing the return day of executions, defines the sheriff's duty in making the money out of the goods seized, and the manner in which this money is to be paid by him, without giving any directions as to the mode in which a *ca. sa.* is to be executed and returned. The answer to this objection is, that there is but one mode of executing a *ca. sa. i. e.* by seizing and imprisoning the debtor. No difficulty in making the return, which can only be, that the defendant was not found, or that he was imprisoned.

It is therefore ordered, adjudged and decreed, that the judgment be affirmed with costs.

FLOWER vs. *LIVINGSTON.*

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APPEAL from the court of the parish and city of New-Orleans.

Forty-eight jurors must be returned, to each term of the parish court of N. Orleans.

PORTER, J. delivered the opinion of the court. This is an action on a promissory note, in which the defendant pleaded the general issue, and prayed for a jury.

The only question which the case presents, is the correctness of the opinion of the court of the first instance, on a challenge to the array.

The defendant objected to the jury, because it appeared, the sheriff had only returned twenty-four persons to serve as jurors, when, by law, the panel should have contained forty-eight.

By an act of the legislature of date the 26th March, 1813, it is provided, that the formalities required by the statute of the territory, which prescribes the mode of summoning grand and petit juries, should be pursued in selecting juries for the district and parish courts. 2 *Martin's Digest*, 198–200. That act provides, that eighteen persons shall be drawn to serve as jurors for the parish courts, whenever they shall be required; and forty-

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eight shall be selected to serve as grand and petty jurors at each session of the superior court.

It is important in the inquiry, which this case presents, to ascertain which of these modes the legislature referred to, when they directed the formalities used under the territorial government, to be pursued in obtaining juries for the parish courts; to that which prescribes eighteen jurors to be summoned, or that which directs forty-eight.

It is against the conclusion, that the latter number was meant, that no grand jurors are necessary in the parish courts, and therefore it would seem a vain thing to summon persons to serve as such. Too much weight, however, cannot be given to this argument, for we find the legislature in the year 1810, directing a list to be formed in order that persons might be drawn from it, to serve *as grand jurors in the parish courts*, at a time when it is notorious these tribunals had not criminal jurisdiction, requiring the aid of such a body. *Acts of the territorial legislature, March* 16, 1810, § 1.

It is equally as difficult to believe, that the number provided for the parish court, under the territorial government, was in the contemplation of the legislature, for the whole pro-

visions in the act are directed to provide a jury for the district court, in which eighteen would not have been a sufficient number. The selection, too, is directed to be made in the manner pointed out by that part of the former law, under which forty-eight were drawn; and the exception, at the close of the section already quoted, that juries might be summoned for three parishes alone, in the state, without making any distinction in the manner these jurors were to be procured, rather strengthens than weakens the conclusion, that only one mode was contemplated for both courts.

But whatever may be the sound construction of this act in relation to the parishes of St. Tammany and St. Helena, in regard to that of New-Orleans, there cannot well be a question; for the statute establishing the city court directs, "that the mode of proceeding before the same, shall be *in all respects* similar to that prescribed for the district court." The modes of proceeding would not be the same, if the same number of jurors were not selected for each.

On the whole, we think that the true construction of the statute is, that forty-eight jurors must be summoned at each term of the

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court, where this cause was tried, and we therefore conclude, that the challenge to the array was well taken.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that this cause be remanded for a new trial, and that the appellee pay the costs of this appeal.

Christy for the plaintiff, the defendant in *propriâ personâ.*

LAZARE'S EXECUTOR vs. *PEYTAVIN.*

Complaints cannot be made that a special verdict was obtained without legal evidence, by a party who did not pray the judge to charge the jury in his favor, nor for a nonsuit or a new trial.

Parol evidence cannot be received to explain a letter, in which there is no ambiguity.

If improper evidence was suffered to go to the jury and it appears they dis-

APPEAL from the court of the second district.

MARTIN, J. delivered the opinion of the court. This case was remanded from this court in April, 1821. 9 *Martin*, 566.

There was judgment for the plaintiff, and the defendant appealed.

His counsel urges, that the judgment was pronounced on a special verdict, grounded on the testimony of one single witness, while the contract, which was thus proven, exceeded in value the sum of $500.

Admitting this, the defendant's counsel, at

the close of the plaintiff's testimony in the district court, ought to have moved for a nonsuit, or requested the court to charge the jury that there was no legal proof before them—or have moved for a new trial, on the ground that the verdict was unsupported by legal evidence.

regarded it, the case will not be remanded by the supreme court.

A special verdict is conclusive to us as to the facts; and the absence of legal evidence cannot be offered to us, to induce us to set it aside; because nothing compels parties to record all the evidence they offer, and the absence of evidence on the record is no proof that none was offered. There is no statement of facts.

Our attention is arrested on a bill of exceptions.

The defendant, at the trial, offered in evidence a letter of the plaintiff's testator, which was read. The plaintiff's counsel then introduced a witness to explain the meaning of part of this letter—by showing what idea the writer meant to convey. The defendant's counsel objected to the witness being examined, as the part of the letter, intended to be explained, was void of ambiguity. The court overruled this objection, and a bill of exceptions was taken. *Civ. Code*, 310, *art.* 242.

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The part of the letter referred to in the bill of exceptions is in the following words:— "As to the $250, which you have paid for me; when I requested you to do so. I thought your situation allowed such an advance. The truth is, I intended to return them, but I thought I should not be called on to do it, because I did not anticipate the unfortunate events which have since befallen you. If I cannot repay the whole, I'll pay a part. Sell my bale of cotton, while you wait for the rest."

The witness deposed, he was present when the letter was written, and was consulted by the writer as to the terms in which it was to be couched. From the conversation which then took place, he thinks the writer meant to say to the defendant, that, inasmuch as the latter had been unfortunate in trade, he would not only refrain from asking him what was due, but would return the money he had borrowed. The witness told the writer, he ought not to use such language, and advised him not to write that way; that these expressions might lead to difficulty between him and the defendant, and milder ones would be more

proper; that they might be considered as an entering into a settlement of accounts. The writer persisted and the witness left him.

It is true the *Code* speaks only, in the part cited, of *acts*—but the principle is applicable to all *writings*. *Contra fidem* SCRIPTI *testis non adhibitur*. It would be monstrous to allow a party to convey an idea, in a letter, and after the effect which the communication of the idea was intended to operate, to turn round and pray to be permitted to show that he did not mean to convey the idea which the expressions used purported.

We think that the court erred in admitting parol evidence to explain a letter, in which there is no ambiguity. But we have carefully examined the evidence, which, in this case, is spread on the record, having been taken down in open court. From this it appears that the jury allowed the defendant every claim of which he offered evidence, and particularly that which the letter was introduced to support—and they did not permit the parol testimony excepted to, to weaken the evidence contained in the letter: It is therefore clear, that the defendant was not injured by the illegal introduction of the parol evidence.

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The case of *Johnson* vs. *Duncan's syndics*, 8 *Martin*, 158. is not unlike this.

The plaintiff and appellee has prayed us to correct an error of calculation, in which the district court fell in from the amount of the judgment, on the facts found by the jury. The wages of the deceased for 20 months, at $800 a year, amount to $1333 33. The jury found he paid $100 for the defendant, in all $1433 33; deduct from this the sum which the jury found to have been paid by the defendant $407—the balance due is $1026 33.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that there be judgment for the plaintiff for one thousand and twenty-six dollars thirty-three cents, with costs in both courts.

Workman for the plaintiff, *Moreau & Dumoulin*, for the defendant.

GRAYSON vs. *VEECHE.*

A party may attach the amount of a judgment recovered against himself.

APPEAL from the court of the first district.

MARTIN. J. delivered the opinion of the court. This is a suit by attachment, in which

the plaintiff caused the amount of a judgment lately recovered against himself, by the present defendant, to be attached.

The latter obtained a dissolution of the attachment, the district court being of opinion "that no attachment can be sued out by a person, indebted to another, for an alleged debt due him, attaching a debt due by himself, in his own hands, and making himself a garnishee." The plaintiff appealed.

According to our act of assembly, effects or credits (*effets ou creances*) of absent debtors may be attached, 1 *Martin's Dig.* 520, *n.* 6.—Hence, if a debt due by such debtor, may not be attached *by the person who owes it*, it must be, because he comes under some exception to the general rule. The district judge has not cited, nor does the appellee's counsel refer us to, any.

In *Graighle* vs. *Notnagel & al.* 1 *Peters*, 245. *Washington*, J. who delivered the opinion of the court, said, that a defendant may attach the money due by him to the plaintiff, in his own hands, and plead the pendency of the attachment to the action against him.

Sergeant, in his law of attachment, 72, shows,

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that in England a party may attach money which he himself owes.

So, if A. recover a debt against B., the latter may attach, in his own hands for, so much as is due him by A. 1 *Rolle's Abridg.* 554.

Our act of assembly authorizes universally the attachment of a debtor's *credits*, and the case cited from *Peters* shows, that this, in Pennsylvania, may be done, even after suit was brought to recover the money afterwards attached; that from *Rolle* shows, that the English courts hold that even a recovery does not prevent the attachment.

Judge *Washington* examines the question on general principles; he does not rely on any particular provision in Pennsylvania, but shows, that there is not the least impropriety or incongruity in a man attaching a debt which he himself owes. His reasoning appears to be conclusive.

We do not see that any distinction may be made, under the general words of our act of assembly. It authorizes the attachment of the debtor's credits, without distinguishing those which are in the hands of a person who has a claim against himself, on which an attachment may issue. *Ubi lex non distinguit nec*

non distinguere debemus. We think the district judge erred.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and the case remanded with directions to the judge to proceed in the case, as if the attachment had not been dissolved; the costs of this appeal to be borne by the defendant and appellee.

Grayson for the plaintiff, *Eustis* for the defendant.

TILGHMAN vs. *DIAS.*

APPEAL from the court of the second district.

An order of seizure and sale can issue on an authentic act written in the French language.

An acknowlegment of the debt and mortgage in a public act, amounts to confession of judgment.

PORTER, J. delivered the opinion of the court. The plaintiff purchased of the defendant a tract of land, and in the act of sale gave a special mortgage on the premises, and an obligation to pay the price at certain periods.

The money not being paid as the instalments fell due, the vendor applied for an order of seizure and sale of the property mortgaged. This order was granted by the district judge, and afterwards enjoined on the

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application of the present plaintiff, who in his prayer for the injunction relied principally on two grounds; first, that the act was written in the French language, and second, that it did not amount to a confession of judgment.

On a hearing of the cause the injunction was dissolved, and the plaintiff appealed.

The case as it stands before us, offers but two questions for consideration; they are, however, of considerable importance.

The first is, whether an order of seizure and sale can issue on an authentic act written in the French language.

The second is, whether the act must not contain something more than an acknowledgment of the debt, and a mortgage for its security. Whether it must not contain also a confession of judgment.

I. The constitution, in the 15th section of the 6th article, has provided, that the public records of the state, and the judicial and written legislative proceedings of the same, shall be preserved and conducted in the language in which is written the constitution of the United States. The inquiry in respect to the instrument which has given rise to the

questions agitated in this case, will be best conducted by considering if this be one of the public records of the state? or if not, is it a judicial proceeding?

The act of congress, which enabled the people of the late territory of Orleans to form a constitution and state government, prescribed a condition which, had it been accepted as proposed, would have raised a very serious question, whether any instrument of writing could be made a matter of record in this state, unless it was done so in the language in which the constitution of the United States is written. Its words were, "that the records of every description shall be conducted in the language," &c. The convention, however, declined acceding to the proposition, and forwarded a constitution in which they provided, not that the records *of every description*, but that *the public records of the state* should be preserved in that language. Congress admitted us with this modification. *Martin's Digest, vol.* 1, 114, 212, 222; *Bioren's laws U. States*, 4, 402.

These expressions "public records *of the state*" we understand to mean all acts done by her in her political and sovereign capacity.

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the memorials of which it is necessary to preserve. Records of the transactions of private individuals, although directed to be enregistered in particular offices, do not make a part of the public records of the state as such; they form no portion of her proceedings in that character; they are records *in* the state, not *of* it.

This construction is strengthened when we compare the proposition made by congress, with that which the people of Louisiana returned to that body in lieu of it, and which was accepted. In place of records of every description, they proposed, the public records of the state should be preserved in the language in which is written the constitution of the United States. The change of phraseology on this matter, when that proposed by congress was implicitly and literally pursued in regard to legislative and judicial proceedings marks clearly their intention then, and furnishes us now with a safe guide in interpreting the language by which they sought to give that intention effect.

The knowlege of this intention is aided by recurring to the sense in which these expressions were understood at the time the constitution was formed by the members of

the convention, whose vernacular language was French, and many of whom were well acquainted with English. In the instrument drawn up in the former language, and which was signed by all the individuals composing that body, the corresponding terms, to "public records of the state," are "*les archives de cet etat*," words which certainly do not convey the idea of the record of the transactions of two individuals in a notary's office.

On the next question, whether this is a judicial proceeding, we think there is as little difficulty as that just decided. Nothing can be considered a judicial proceeding, at which a judge does not preside, or which is not done by his order, either express or implied. The act of sale and mortgage, passed before the notary, was a voluntary act of the parties executed before a person possessing no judicial authority. It is not a judgment of itself, for no clerk or other ministerial officer could issue execution on it as in the case of judgments in our courts. It is the evidence furnished by the party to obtain judgment: evidence which the judge must examine to ascertain if a debt is due, on which he must decide, and on which he in fact renders judg-

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ment when he accedes to the prayer of the vendor, that the vendee be compelled to execute his argreement. Under our law, to be sure, this judgment is carried one step further than in that of the *via ordinaria;* for it directs what species of execution shall issue, but it is still not less a judgment on that account. This position we think will appear incontrovertible when we examine the second point made in the cause, namely, whether it is necessary that a public act, which authorizes an order of seizure and sale, should contain a confession of judgment.

II. A difference of opinion and practice has prevailed in this state since the enactment of our *Civil Code*, on this subject; and the writers on the Spanish law are by no means uniform in the opinions which they express in respect to it. We have given to the question very considerable attention.

The *Code* provides, that if the title of the mortgagee amount to a confession of judgment (*emporte execution parée*) he may, on making oath that the debt is due, obtain an order for the immediate seizure of the property mortgaged. *Civil Code*, 460, *art.* 40.

If the law just quoted had went further

than it does, and declared in express terms what species of act amounted to a confession of judgment, it would still have left the ancient laws in force and vigour; for in saying that on a title of that kind execution may issue, it uses no negative expressions, and it would not be inconsistent with the affirmative terms, in which this proposition is announced, that it should also issue on others. *De Armas' case*, 10 *Martin*, 158.

But the provision cited does not go so far. It leaves us to inquire from some other of our laws, what "amounts to a confession of judgment," what kind of instrument it is which will *emporte execution parée.*

The writers on Spanish jurisprudence, as has been already observed, hold different opinions on this point. Some of them insisting, that an instrument, which will authorize an order of seizure and sale, must contain what they call *la clausula guarentigia*, which is conferring power on the judges to execute the engagement expressed in it, in the same manner as if it had received the definite sentence of the judge, or passed into the authority of *cosa juzgada*, *Frebrero*, *p.* 1, *cap.* 4, § 4 *n.* 88. Others state, that it sufficient if the act is

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a public one, and that it is not necessary that the clause first mentioned should be inserted in it. The weight of authority appears to us decidedly in favour of the latter opinion, and that opinion is conformable to the 1st law of the 28th title of the *novissima recopilacion, book 11th, Febrero p.* 2, *lib.* 3, *cap.* 2, § 1, *n.* 28. *Curia Phillipica, p.* 2, § 7, *instrumento n.* 1. *Gomez comment, in leg. Taur.* 64. *Sala de derecho, vol.* 2, 3, 15. *Villadiego instruc. pol. cap.* 2, 7, *p.* 32. *Parladoria, rerum quot. lib.* 2, *part*, 1, *cap. fin.* § 11, 5 & 6. *Curia Phillipica, illustrado, vol.* 1, *part* 2, § 7, *n.* 1. The concurrence of this court with the doctrine which these authors teach, has already been expressed in the case of *Day* vs. *Fristoe*, 7 *Martin*, 239.

On the whole, we think the order of seizure and sale properly issued in this case, and we do therefore order, adjudge and decree, that the judgment of the district court, dissolving the injunction, be affirmed with costs.

Livermore for the plaintiff, *Moreau* and *Dumoulin* for the defendant.

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APPEAL from the court of the second district.

PORTER, J. delivered the opinion of the court. This case presents the same questions with that just decided, and is between the same parties. For the reasons which induced this court to affirm the judgment of the district court in that case, it is ordered, adjudged and decreed, that the judgment of the court below be affirmed with costs.

The same points were determined in this, as in the preceding case.

Livermore for the plaintiff, *Moreau and Dumoulin* for the defendant.

HOFF vs. *BALDWIN.*

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. This is an action brought against the defendant, as drawer of a bill of exchange on Samuel T. Beale, Bardstown, Kentucky. Several grounds of defence are set up in the answer, and among others—that no notice was given of the dishonour of the bill. The district judge being of that opinion, gave judg-

The oath of a notary, that he protested the draft, and that he was generally in the habit of giving notices on all protested notes and bills, and presumes that he gave notice to the defendant, as he was requested to be very particular about it; and that his habit was to put notices into the

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ment against the plaintiff, from which judgment this appeal is taken.

The evidence, which it has been contended establishes the notice, is contained in the deposition of a notary public, residing in the place where the bill was made payable and protested. He swears, that he protested the draft, and that he was generally in the habit of giving notices on all protested notes and bills, and presumes that he gave notice to the defendant, as he was requested to be very particular about it. In regard to the time he sent it off, he declares that his habit was to put notices into the post-office, to be sent off by the first mail, but having a great deal of protesting to do that summer, he has no distinct recollection about notifying the present defendant.

post offices, to be sent off by the first mail, but having a great deal of protesting to do that summer, he has no distinct recollection about notifying the defendant, is no sufficient proof of notice.

Notice of protest, of bills of exchange, is matter of strict law, and a failure to give it is fatal to the right of recovery, in cases where it is required by the *lex mercatoria*. In that now before us, we agree with the district judge, that the proof of the defendant having received notice, is not sufficiently established, and for the same reason which he gives. The witness merely states, that it was his *general*

habit, and that, from that habit, he presumes he did not neglect putting notice in the post-office. The expression *general habit*, negatives the idea that the witness was able to state it was his *invariable* one ; and when he can only venture to say, that a presumption is raised in his mind from his common practice, we cannot say that presumption establishes a fact to ours. *Chitty on bills*, (*ed.* 1821) 522. In the case cited from *Johnson*, the witness swore he had not a doubt but that he gave notice.

On the point as to the time when he put it in the office, the evidence is still weaker, for though he states, he was accustomed to do it regularly, he mentions that, having a great deal of protesting to do that summer, he has no distinct recollection about notifying the present defendant.

The plaintiff insists, this case should be taken out of the general rule, on the ground that it has been proved, the drawee was a partner in the commercial house of the drawers. *Phillips on Ev.* 2, 36. The bill is drawn by Joshua Baldwin & Co. in favour of Neill & Davis, on Samuel T. Beale. The evidence relied on to establish that Beale, the drawee, is a partner in the house of Baldwin & Co. is contained in the

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deposition of a witness, who in answer to an interrogatory, if he is acquainted with the parties to the suit, as well as the parties to the bill annexed, answers, that he is acquainted with Joshua Baldwin, Samuel T. Beale and Wilson L. Davis and Gordon Neill, the two last compose the firm of Neill and Davis. This proof does not enable the court to learn who are the partners in the house of Baldwin & Co.; whether the four persons just named make the firm, or if any of those persons compose it, which of them. There would be as much reason to say, that Baldwin and Davis formed the partnership of Baldwin & Co., as that Baldwin and the payee and drawee all be-belonged to that house.

We think the judgment of the district court should be affirmed with costs.

M'Caleb for the plaintiff, *Maybin* for the defendant.

GRAY vs. *TRAFTON & AL.*

No particular form and specific instrument in writing is required in the assignment or

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This is a suitcommenced by attachment,

transfer of debts. It may as well be done by an order on the debtor to pay a third person, as by giving up the evidence of the debt.

in which a counsellor and attorney who had collected, by due course of law, money for the defendants, is made garnishee. It appears by his answer, that the funds of the defendants came into his hands only one day before the levy of the attachment; that he claims for himself, and G. Eustis, his former partner in the practice of the law, a right to retain two hundred dollars of said money, as a compensation for professional services; that the balance he holds subject to the order of Mark Trafton; and that he is informed and believes, that said sum had been (long since) assigned to one Dellingham, &c. The evidence in support of the claim of this assignee, who has intervened in the present case, establishes the following facts:—1 that certain notes were placed in the hands of Eustis and Livermore, for collection, at the request of the defendants; that Dellingham, who it appears, handed the notes to the attorneys, was authorized to assign two hundred dollars arising from said collection to a third person, which was done, and the assignment of that sum finally ensued to the benefit of one Phelps who has also intervened in the present case; and that an order, in favour of the claimant

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Dellingham, was drawn by the defendants on G. Eustis, for the balance of the money which might be obtained from the collection of said notes, after deducting the previous assignment of two hundred dollars, which order was verbally accepted by the latter, the amount to be paid on condition of the money coming into his hands; which never happened; but was received by his partner Livermore, as appears by his answer, and with a knowlege of the previous assignment by Trafton to Dillingham.

On these facts the district court gave judgment in favour of the claimants, from which the plaintiff appealed.

Two bills of exceptions were taken by the plaintiff in the course of the trial of the cause in the court below; one to the introduction in evidence of the order from Trafton to Eustis, as not being a legal mode of cession or assignment of a debt, and another to the proof of said order by parol testimony. As to the first, it is believed that no particular form, and specific instrument in writing is required in the assignment or transfer of debts. It may as well be done by an order on the debtor to pay a third person, as by giving the title or

evidence of the debt; and as to the objection to proving the order by parol, it is sufficient to observe, that we believe it to be the uniform and established practice, to make proof in this manner in all commercial transactions, which relate to bills of exchange, orders, or notes of hand; by proving the hand-writing of the parties concerned in uttering them.

But the appellant insists on a preference being given to his attachment, over the rights set up by the claimants, on the ground that no legal notice had been given to the debtor, of the assignment and transfer of the debt, previous to the service of the writ; and that such notice has not been given. His counsel rely on the provisions of the *Civil Code*, made in relation to the assignment and transfer of debts, 368, *art.* 122. According to this article of our *Code;* the transferor is only possessed as it regards third persons, after notice has been given to the debtor, of the transfer having taken place. The transferor may, however, become possessed by the acceptance of the transfer, by the debtor, in an authentic act.— By this law it is clear, that after proper notice to the debtor of a transfer of his debt, the transferor is possessed of the original credi-

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tor's rights, against said debtor, and also against third persons, provided there be no fraud in the transfer. The corresponding word in the French text of the *Code*, to the word notice in the English, is *signification*, which the plaintiff's counsel asserts to be technical in its effects, and must be served on the debtor in a particular manner; that is, by the ministry of an officer.

In support of this doctrine, we are referred to the 1690th article of the *Code Napoleon*, which is verbatim the 122d of our *Code* above cited. It does appear, from other authorities on the laws of France, to which we are also referred, that in the administration of justice, according to the usages of that kingdom, signification must be made of a transfer of debts by officers whose peculiar duty it is to give such notice. But in the state of Louisiana such formality cannot be required, because there are no ministerial officers of justice, who can be compelled to perform services of that kind. And therefore no such technical force can be given to the word notice, or signification, as does perhaps prevail in France.

No evidence of a higher or more authentic nature ought to be required, to establish the

fact of notice to a debtor, of the transfer of his debt, than would be sufficient to prove any other fact, in support of the claim of a suitor, and which must be done in conformity to the rules of evidence, as fixed by our jurisprudence.

An acceptance of the transfer by the debtor, in an authentic act, gives possession of the debt to the transferor. Now, because the expression *authentic act*, is used in the *Code*, the plaintiff's counsel would infer that any other mode of acceptance would not produce the same effect, considering the expression of this mode as excluding all others. We are of a different opinion. Notice to a debtor appears to be required by law, to prevent an improper payment after the debt has been transferred, and protect and secure the rights of the transferor. An agreement by the debtor, to pay to the transferor, is such an acceptance of the transfer by the former, as necessarily involves notice, and consequently, secures the rights of the latter against all persons.

In the present case, the evidence fully establishes the fact, that Trafton's attorneys agreed to pay to the claimants, the amount by him ordered, when the money should be col-

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lected, which did not take place until long after the date and acceptance of his order.—The attorneys were, therefore, debtors only conditionally, viz.—in the event of recovering the money of their client. The latter was free to direct its appropriation in anticipation of collection; and the persons to whom payment was ordered, after acceptatance by his agents, held a vested right in the debt, subject however to the condition of said acceptance.

From that period Trafton' s attorneys, thus charged with the collection, may be considered as trustees for the claimants, who had a vested interest; and consequently, the funds thus transferred were not subject to the plaintiff's attachment. See 4 *Dallas' Reports*, 281.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Hawkins for the plaintiff, *Livermore* for the defendants.

GUILBERT vs. *DE VERBOIS.*

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If the plaintiff offers no proof of the damages alleged, judgment may be given generally for the defendant.

So, if the parties allege titles, without averring a conflict, there may be judgment for the defendant.

APPEAL from the court of the fourth district.

PORTER, J. delivered the opinion of the court. For a correct understanding of this case, it is necessary to state with accuracy the pleadings; and the finding of the jury on the facts, submitted to them.

The plaintiff avers, that he is the true and lawful possessor, and proprietor, of a tract of land situated in the parish of Iberville, on the left bank of the river Mississippi, bounded on the upper side by land of Abner L. Duncan, and having a front of ten arpents with the ordinary depth.

That on the first day of January, 1809, and on several other days, and several other times between that day and the first day of September, 1817, Francis De Verbois and Dominique De Verbois, both of the parish of Iberville, entered on the land of the petitioner and then and there cut down trees growing thereon, to the value of $500, and carried them away; and that they still continue to commit trespasses of the same kind.

The petition concludes by a prayer, that the defendants may be condemned to pay the

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sum of $500, and that they be enjoined from any further waste on the premises.

To this petition the defendants answered by pleading the general issue:—title in themselves to 36 arpents of land in front on the left bank of the Mississippi, by virtue of a purchase made in the year 1807, and continued possession from that time.

They also opposed the plea of prescription, and prayed that the vendors might be cited in warranty.

On these pleadings, the following facts were found by the jury, on those submitted by the respective parties.

On behalf of the plaintiff, they found that Walker Gilbert purchased from Jacques De Villiers on the 30th day of May, 1808, *the land mentioned in the petition*, of ten arpents in front by forty in depth; but that he did not receive possession of it. That Villiers' title consisted of an order of survey, dated the 3d October, 1796, which had been since confirmed by the commissioners of the land office of the eastern district, viz. in the month of January, 1812.

On the part of the defendants, they found that they (the defendants) have been in pos-

session of the tract of 36 arpents, that they purchased it from Mayronne and Degruise, and that the ten arpents front form no part of it; that the title has been confirmed by the board of commissioners of the land office, and that the defendants have had possession since the year 1800. That Jacques De Villiers was the overseer of Mayronne and Degruise, on the tract of 36 arpents, but not on the ten arpents in litigation.

On this verdict, the district judge being of of opinion that the defendants had acquired a right to the premises by prescription gave judgment in their favour against the plaintiff for costs of suit, and the latter has appealed; and insists that it appears by the pleadings, the title was not put at issue, and therefore the judge erred in giving judgment against him in relation to it.

Two questions arise out of the proceedings in the district court, the one in regard to the damages alleged to be sustained by the trespasses committed on the property of the plaintiff; the other respecting the titles which the parties have set up.

The former so far from being established does not appear to have been even submitted

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by the plaintiff to the jury. On this point then, the district court certainly did not err in giving judgment for the defendants.

On the latter, the counsel for the plaintiff is correct in saying, that by the petition and answer it does not appear the parties were at issue on the question of title, although they may have intended it. The plaintiff avers, that he owns ten arpents of land in front, and the defendants say that they are proprietors of 36; both of which assertions may be true, but must be considered wholly unimportant, unless the title call for the same land. This the parties have not told us they do; and if they do not, we cannot examine them. We cannot assist parties in ascertaining their rights to property, unless these rights conflict with those of others; we cannot notice their abstract pretensions.

This fact, however, of the titles not interfering, does not rest on the pleadings alone. The inquiry was gone into on the trial, and the jury found it as both parties had asserted. The third fact submitted by the defendants was in the following words:—"The defendants purchased a tract of land of 36 arpents from Mayronne and Degruise on the 28th December, 1807, of which the ten arpents in dis-

pute are a part." To which the jury replied "yes; the defendants have purchased the tract of 36 arpents; the tract of ten arpents does not make a part of it." On this finding, we are also of opinion, the court did not err in giving judgment for the defendants with costs.

It is therefore ordered, adjudged and decreed, that that judgment be affirmed with costs.

Hennen for the plaintiff, *De Armas* for the defendants.

HEIRS OF ANDREWS vs. *EXECUTORS OF ANDREWS.*

APPEAL from the court of probates of the parish and city of New-Orleans.

The attestation of subscribing witnesses does not mar an olographic will.

Workman, for the defendants. The validity of the testament of the late A. Andrews, is the sole point in dispute in this case. If it be not good as a nuncupative testament, as it is attested by no more than three witnesses, instead of the number which the law requires, it certainly has all the requisites to constitute a valid olographic testament. It is entirely written, signed and dated with the testator's hand; and the law subjects this will to no

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other formality. It is true, that the *Code* defines the olographic testament to be "that which is made and written by the testator himself, *without the presence of any witness. Civil Code*, 230, *art.* 103.

The true coustruction of this sentence seems to me to be, that the presence of any witness is *not indispensably necessary* to the validity of such a will. The subsequent paragraph of this article, declares that the olographic will is subject to no other form but that of being entirely written, signed and dated, with the testator's hand. And this would control and repeal the first paragraph of the article, if their provisions were considered to be contradictory. Besides, the will in question may have been *made* and *written* by the testator himself, *without the presence of any witness*, although some witnesses should have afterwards signed it. The contrary does not appear, and is not to be presumed gratuitously.

The formalities prescribed for giving validity to testaments, are intended to secure their genuineness, and prevent forgery and perjury. The olographic form is allowed not for the sake of *secrecy*, (for the olographic will may be either *open* or sealed) but to facilitate

to those who can write, the means of disposing of their property after their death. The presence of one or more witnesses, at the writing or signing of such a will, cannot defeat or counteract any of the objects of these laws.

It would, on the contrary, be an additional security against forgery and falsehood.

It is evident, then, that the signatures of Vance, Moore, and Legendre to the present will must be considered as only surplusage; a something more than the law required, but which should not invalidate a will, good in all other respects, any more than the signatures of ten or twenty witnesses would render void a testament to which only five or seven witnesses were requisite.

This court have already recognized and enforced, the principles on which my reasoning is founded, in the case of *Broutin and others* vs. *Vassant*, 5 *Martin*, 169.

They decided in that suit, that *superscription* is not an essential requisite of a sealed olographic will; under the law which provides, that when this will is sealed, it needs no other superscription than this, or words equivalent, "This is my olographic will." If a formality which the law specifies, and seems almost to

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require, may be thus dispensed with, a formality beyond what is required, ought not surely to invalidate a will, which is acknowleged to be in no way defective.

The provisions of our *Civil Code* respecting the olographic will, are evidently taken from the *Code Napoleon.* But the French tribunals, rigorous as they always are in their construction of the laws prescribing the formalities of testaments, have never held that an olographic will, made with all the forms which the law requires, could be vitiated for containing something, or any thing more. On the contrary, they have decided that, *Les mots surchargés, dans un testament olographe, n'en operent la nullité ni totale, ni partielle.* Also, *Un testament ecrit, daté, et signé par le testateur, vaut comme olographe, alors même qu'on a manifesté l'intention de le faire revetir de la forme mystique.* Again, *Un testament entierement ecrit, daté et signé de la main du testateur, peut valoir comme olographe, quoique, on ait observé à son egard, mais d'une maniere vicieuse, quelques formalités, prescrites pour le testament mystique.* This last case is ours, changing the mystique into the nuncupative testament. See *Paillet, Manuel de droit Francais,* 342; 10 *Sirey,* 289; 14 *same work,* 217. *Journal du Palais, t.* 44, *p.* 1.

The reasons of the dispositions of the law, on which these decisions are founded, are very evident. The will itself must be wholly written by the testator; for, if written by the hand of another, it might not be done with fidelity and exactness. It must be signed by him also; because, a will written but not signed by him, could only be considered as a draught, or project of a will. This signature alone, gives confirmation and validity to the act. And lastly, the date is indispensable; for without it, if several olographic wills were presented, it might be impossible to determine which was the last, and consequently, the valid one.

A question has been raised respecting the manner of proving this will.

The law requires in general, that when an instrument is executed in the presence of witnesses, it must be proved by one or more of them, if living. But this rule is dispensed with, as to nuncupative wills, by the 159*th art.* of the *Civil Code, p.* 244; which provides, that if none of the persons who were present at the said acts, are living *near the place*, but all are absent or deceased, it will be sufficient for the proof of said testaments, if two credi-

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table persons make a declaration on oath, that they recognize the signatures of the different persons who have signed the will, or superscription. And the next article directs, that olographic testaments must be proved by two creditable persons, who must attest that they recognize the will as being written, dated and signed, in the testator's hand writing. These provisions remove all difficully as to the proof of the will now in question. It has been proved as well as made, in every respect as the law requires.

Duncan, for the plaintiffs. The testament of Arthur Andrews cannot be brought within either of the three classes provided for by our laws, and such has been the strictness required, that even the want of any of the formalities prescribed, for the one or other of these classes, would be sufficient to render the will void; that these formalities are conditions, without which the instrument is not complete.—*Knight* vs. *Smith*, 3 *Martin*, 163.

The instrument under consideration cannot be classed with the nuncupative or mystic testament, but may, as Mr. Workman argues, be regarded as a good olographic will, pos-

sessing, as he conceives, all the essential requisites of that class, being entirely written, dated, and signed with the testator's hand. I think the counsel has confounded some of the formalities of that description of testament, with the essentials; or rather has overlooked an essential requisite, that it should be made and written "without the presence of any witness" is an essential, without which, it can neither be defined, classed or proved as an olographic testament. Independent, indeed, of the attestation, it may possess all the forms requisite for that description of will, but when witnesses are called to attest its execution, it, from that moment, ceases to be olographic.

The argument that the presence of one or more witnesses, at the writing or signing, would furnish additional security against forgery and falsehood, is, at first view, strong and imposing; but, upon closer examination, I think it will be found more plausible than solid. To dispense with witnesses or the attestation generally required, you must find the case or exception to that rule; when entirely written, signed and dated, without the presence of any witness, is, I apprehend, the case, and the only one known to our laws, in which

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a testament would be declared to be valid, without the aid and presence of the precise number and character of witnesses required by law; and let it be recollected, that we are not prermitted to determine, or called upon to say, whether it would be better or worse, gives more or less security, to have a few witnesses at hand; if any, the law has determined the number.

I cannot agree with Mr. Workman, in rejecting or considering the subscribing witnesses as surplusage. In the case of *Broutin & al.* vs. *Vassant*, 5 *Martin*, 159, this court decided, that the superscription was neither of the form or essence prescribed for olographic testaments; and therefore considered it as surplusage. Although that class of testaments is subject to no other form, but that of being entirely written, signed, and dated with the testator's hand; yet, some of those forms may certainly be regarded as essentials, which we are no more at liberty to dispense with than we should be warranted in making substance yield to form. To make it olographic must it not be *entirely*, *wholly*, all written by the testator? In *Merlin's Repertoire*, 13, 747, we have the answer, and it is so happily in point,

that to transcribe entire, will, I am sure, be excusable. *Il a été rendu, au parlement de Flandre, un arrêt qui juge quelque chose de semblable. Le sieur Goulart, après avoir fait en Hainaut un testament olographe, avait appelé deux témoins pour certifier sa signature ; et dans la crainte qu'on n'altérât ses dispositions, il en avait signé et paraphé toutes les pages conjointement avec ses deux témoins. Après sa mort il s'éleva une contestation sur ce testament. Les Héritiers le soutenait nul, par le mélange de formes étrangères à la nature des testamens olographes, et il fut déclaré tel, de toutes voix, par arrêt du* 28 *Janvier*, 1766, *au rapport de M. de Sars de Curgies, à la premiere chambre, après partage dans la troisième.* But it is said, we can strike out that which in other countries is considered the most important part of the instrument, its *attestation*, and thereby meet the literal signification of the word olographic; but if that rude operation can be tolerated, how shall we get rid of another essential, and one, let it be recollected, which cannot be found in the French law, either as it stood before or after the publication of the *Code*, from which we have copied, that it should be written *hors la presence d'aucun temoins.* If without, or rather out of the presence, cannot be made to mean

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in the *presence* of witnesses: if that expression is clear and free from ambiguity, how can this honourable court under the maxim adopted for their government, in the case of *Knight* vs. *Smith*, 3 *Martin*, 165, consider the attestation as surplusage? Why require that the testator should be alone, that he should write *hors la presence d'aucun temoin?* Perhaps, that in the performance of so solemn an act, he should not be embarrassed or interrupted by the presence of any person—that he should be uninfluenced in the disposition of his estate by the suggestions of an artful or officious friend; and, if any such motive could have influenced the legislature, must not the presence of acting, attesting witnesses take the instrument out of the spirit as well as the letter of the law, which authorizes the disposition of estates by olographic testaments? "But when the law is clear and free from all ambiguity, the letter is not to be disregarded under the pretext of pursuing the spirit." *Civil Code*, 4.

If probate can be taken of the will, its execution must be proved by the subscribing witnesses, if to be found within this state. To dispense with such proof, would be to lose

sight of the first and best rule of evidence, "that the best evidence which the nature of the case will admit of, must be produced," and open a wide door to the very mischief which the opposite counsel admits the law intended to provide against. Forgery in our day is in reality reduced to a science; the art of imitating hand-writing has of late been brought to such perfection, that within the observation of the opposite counsel, as well as my own, whole pages have been so closely imitated as to deceive the most intimate friends of the person upon whom the fraud was attempted; and is it in such times, that we are so to relax the rule of law as to take the fallacious proof by comparison of hand-writing, instead of resorting to those who can make the proof perfect? My mind answers no; and if rightly answered, the character of the will is ascertained. The moment you are obliged to call upon the subscribing witnesses it will cease to be an olographic will, and not having a sufficient number of witnesses, must be rejected as a nuncupative testament. *Denizart* mentions a case in which the operation of *striking out* was also proposed, the testament being partly olographic, and partly before a notary; but the tes-

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tament was declared void. *Merlin's Repertoire*, 13, 747.

Workman, in reply. The literal signification of the word olographic, does not exclude, as the adverse party suppose, the idea of an attestation to an instrument. The olographic act is one written entirely in the the hand-writing of the maker of that act, whether it be witnessed or not. The decision quoted from *Merlin*, can have no authority in this case; because, it is founded on a law anterior to that of the *Code Napoleon*, from which ours is borrowed—on a law too (the ordonnance of 1735) which does not contain the important clause, *et n'est assujetti à aucune autre forme.* Besides, this antiquated judgment of a provincial tribunal is diametrically opposite to those of the high court of cassation, which have been already cited. It is difficult to conceive why the editors of our version of the French *Civil Code* have thrust in the variation of *without the presence of any witnesses.* But whatever may be its meaning or importance, it is evidently repealed, as I have before stated, by the succeeding paragraph of the article in which it is contained.

If the attestation to this will be, as I think it is, of mere surplusage, then the will is admitted to be proved as the law directs: And even, according to the rule of jurisprudence insisted upon by the adverse counsel, our proof is still complete; for it has been made, as the court will see from the admission on record, by two of the attesting witnesses themselves.

The objection cannot be maintained, that witnesses were not necessary or proper in such a will. Witnesses are not necessary to a promissory note, or a receipt. But it never was supposed, that such an instrument would be vitiated by being attested. It could only be requisite that the attesting witness should prove the instrument. And this is all that can be required of us, in the present case, admitting that the exception to the rule of evidence, in favour of nuncupative wills, *Civil Code*, 244, *art.* 159, does not extend to olographic wills, to which the signatures of witnesses might be unnecessarily affixed.

PORTER, J. delivered the opinion of the court. This appeal has been taken from a decision of the court of probates, relative to

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the last will and testament of Arthur Andrews deceased. The judge, conceiving the instrument presented to him to be clothed with all necessary requisites to render it valid as an olographic will, admitted it to probate. The heirs appealed.

The paper produced as the testament of the deceased, is proved to have been written, signed, and dated by him. At the foot, however, three persons have affixed their names, "as witnesses present."

The appellants contend, that the writing of the will in presence of three witnesses, together with their signatures, render it void as an olographic testament. The appellees insist, that the names of the witnesses are only surplusage.

"The olographic will or codicil is that which is made and written by the testator himself without the presence of any witness."

"An olographic testament or codicil shall not be valid, unless it be entirely written, signed, and dated with the testator's hand. It is subject to no other form." *Civil Code*, 230, *art.* 103.

The counsel for the heirs has relied much

on the expressions "written out of the presence of witnesses," as a reason why this will, written in their presence, cannot be an olographic one. We think that the legislature, in making use of this expression, intended to mark the distinction between wills of this description and those to which witnesses are indispensable. There is no other construction will give effect to the last clause of this article, which states that this kind of instrument is subject to no other form than being written, signed and dated, in the hand-writing of the testator.

The most serious question which the cause presents is, whether the signatures of the witnesses do not render void an act which the law requires the testator to write entirely in his own hand.

We have been referred, by the counsel of both parties, to decisions rendered by tribunals in France on a law expressed in nearly the same words as our own. In those cited by appellees, the wills were mystic ones, and it clearly entered into the consideration on which they were decided, that the act of superscription on the envelope, and the testa-

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ment itself, were two distinct and separate acts. That relied on by the appellants, was a case where the testator called to his assistance two witnesses; but where they not only signed the will at the bottom, but affixed their names with that of the testator on each page. Making every allowance, however, for the difference in the facts, it is impossible to reconcile them. The former were held good, because an act, complete itself in one character, was not vitiated by an abundant caution in endeavouring to give it validity in another. It is not easy to see why the same reason did not govern the latter, which was held null, because there was a mixture of forms, foreign to an olographic testament. This decision, however, was by a provincial parliament; the others, by the court of cassation.

Leaving them however aside, and considering the point as if it was now presented for the first time, we are of opinion that this will is valid as an olographic one. The great principle which governs courts in cases of this kind is, to give effect, if possible, to the intention of the parties. Where the legislature has pointed out a particular form, in which that intention must be expressed, the operation of

this principle is of course limited; but the instrument is not destroyed, it still remains; and if it is good in one form, though not in another, it must be enforced in that in which it may have effect: for, it is still the act of the party, and the particular regulation does not interfere with the general principle just spoken of. Hence, the maxim common to all systems of jurisprudence with which we are acquainted, *ut res magis valeat quam pereat. Dig.* 34, *tit.* 5, *l.* 13. Hence, the provision of our *Code*, that an act which is not valid as an authentic act, through defect of form, avails as a private writing, if it is signed by the parties. *Code*, 304, 218. And hence, the principle contained in the *Roman law*, which has a still more direct application to the case before us; that when a person intends to make a will under a particular law, and fails through defect of form, he does not, for that reason, deprive himself of the advantage of having it declared valid, if it is good under any other form by which he is privileged to make it. It is this law which furnishes the principal ground of the opinion given by *Merlin* in his *questions de droit, vol.* 5, 222. See also *Domat*,

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liv. 3, *tit.* 1, § 5, *note to art.* 19. *Broutin* vs. *Vassant*, 5 *Martin*, 169.

The will here is entirely written, signed and dated with the hand of the testator; there is no writing in the *body* of the testament by any other person. *Toullier, Droit Civil Francais, liv.* 3, *tit.* 2, 357. The witnesses sign at the bottom, and their signatures make no part of it.

We are therefore of opinion, that the judgment of the parish court be affirmed with costs.

*** There were a few cases determined at this term, which are not printed, as petitions for a rehearing had been presented when this sheet was put to press.

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